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3485
v. 3485

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CLARENCE JAMES LOPEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,525

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
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Attorneys for Appellee

FILED

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For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and hereby adopts Appellant's
Jurisdictional Statement.

II.

STATEMENT OF FACTS

The Government accepts and hereby adopts Appellant's Statement of Facts, with the addition that will be set out in the argument. (Hereinafter the Clerk's Record of the Transcript on Appeal will be referred as to "RC," the Reporter's Transcript of the testimony will be referred to as "RT," the number following will refer to the page and the number following "L" will refer to the line; the Appellant, Clarence James Lopez, will be referred to as "Juvenile" or "Appellant.")

III.

OPPOSITION TO SPECIFICATION OF ERRORS

The District Court did not err in admitting into evidence the statement made by the Juvenile.

IV.

ARGUMENT

The Appellant, with the presence of his mother, was advised as to his "rights" and did make a voluntary waiver of those rights.

The testimony of Special Agent Donald Marsland showed that the defendant was asked to bring his mother into the

room after he and another FBI agent had identified themselves and told him they were federal officers. They asked him if he would mind talking to them and he said that he would not. They told him they wanted to talk to him about the attack on his grandfather, Xavier Rios. They asked if his mother was present and asked that she join them. They read him his "Miranda" rights from a form, Government's Exhibit 24 in Evidence, and it is as follows:

"YOUR RIGHTS

Place: Tucson

Date: June 2, 1967

Time: 1:26 p.m.

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at anytime. You also have the right to stop answering at anytime until you talk to a lawyer.

"A lawyer will also be provided for you now, if you wish, by the Federal Public Defender's Office, Phoenix, Arizona, whom you may call at 253-7907.

"WAIVER OF RIGHTS

"I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this

time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

/s/ Clarence Lopez

"Witness: Donald W. Marsland, SA, FBI
San Xavier, June 2, 1967

"Witness: Alan H. Harrigal, SA, FBI
San Xavier, June 2, 1967

Time: 1:32 p.m."

They had the Juvenile explain to them what had just been read to him. Then they asked him if there was anything he would want explained. The Juvenile asked to have explained the word "coercion" to him (RT 110 thru 116). He was left alone to discuss it with his mother (RT 119, L 21-22). It took from 1:26 p.m. to approximately 1:32 p.m. to explain his rights to him and to discuss his rights with him and to have his mother discuss his right with him alone (RT 110, L 15 and 122, L 8). He then was asked if he waived his rights and was willing to answer questions. He stated he would, and he executed the waiver (RT 114).

The Juvenile's counsel then asked to have an opportunity to place the Juvenile on the stand for the purpose of showing no understanding of the waiver (RT 126, L 9-11). The Juvenile then waived his right to take the stand (RT 126, L 18-19). The matter was then argued and the Court found:

"THE COURT: Everything that is before the Court indicates he did understand his right, that the agents were very, very careful to see that he did and all of the evidence

in the case indicates he practically demonstrated his understanding of what they were trying to get across to him. I think we would have a much more serious grounds for complaint if they had taken him away from his home and had taken him to some office where he was in strange surroundings. But they went to his home, in the presence of his mother, they insisted she come in and be there so he could have the benefits and comfort of her presence. Apparently immediately that suspicion began to focus on him, that they again advised him of his rights. I think the evidence makes it clear that he was advised of his rights and all of his rights and that his statement, that any statement he made, I assume from what has been said, before he did make a statement, was made voluntarily and understanding his rights and without any coercion, any promises or threats and it was voluntary. Therefore the objection to the statement is overruled." (RT 127, L 18 to 128, L 11)

The Juvenile gave several different versions during the interview. Several times his mother, when he would give one of his versions, would state: "Clarence, you are not telling them the truth, tell them the truth". (RT 131, L 1-2; 133, L 8-9) He then stated that he did it. He stated, "I did it with another guy." (RT 133, L 10)

At this point, the agent again advised him as to his rights and told the Juvenile to discuss it with his mother. They left the room (RT 133). They returned in about ten minutes and the Juvenile then requested an attorney (RT 133, L 16-17).

He was immediately taken to Tucson before the United States Commissioner and an attorney was appointed for him (RT 133, L 23-24).

In the *Application of Gault*, (1967) 387 U.S. 1, 87 S.Ct. 1428, the Supreme Court stated at page 55:

"We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the privilege."

Appellant argues that the Court should adopt the recommendations of the President's Crime Commission which were quoted in the *Application of Gault, Supra*, but the Supreme Court did not adopt them.

On appeal, the evidence must be construed in the light most favorable to the Government. *Glasser v. United States*, (1942) 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The Court did find the statement was voluntarily made and an intelligent waiver of rights was made. Appellant argues at page 16 of the Opening Brief, that the Juvenile should have been allowed to complete his statement since he had waived his rights. Counsel overlooks the rule of *Miranda v. Arizona* (1966) 384 U.S. 437, 17 L.Ed. 2d 694, 86 S.Ct. 1602, that a defendant has the right to refuse to answer questions at any time.

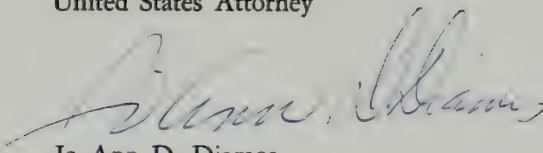
V.

CONCLUSION

It is respectfully submitted that the statement of the Juvenile was made after he was fully advised as to his rights, understood them, and waived them.

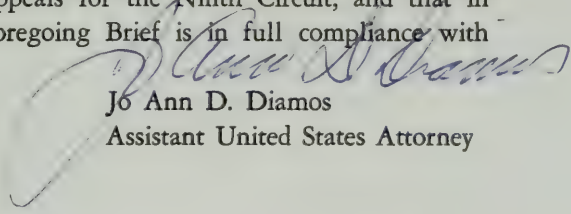
Respectfully submitted,

Edward E. Davis
United States Attorney



Jo Ann D. Damos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Damos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this ^{5th}
day of April, 1968, to:

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N O. 2 2 5 2 7 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM DUKE ANDREWS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM DUKE ANDREWS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On July 27, 1967, a six count indictment was returned against appellant by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2]. ^{1/}

The indictment charged appellant with the violation of Federal laws relating to the possession of stolen mail and the forgery of United States Treasury Checks [C. T. 2].

Appellant was convicted on all six counts at a trial before the District Court on August 16, 1967 [C. T. 21, 38]. Trial by

^{1/} "C. T. " refers to clerk's transcript.

jury had previously been waived by the appellant [C T. 20].

On October 23, 1967, appellant was sentenced to the custody of the Attorney General for ten years on Counts One, Three and Five, and was sentenced to five years on Counts Two, Four and Six, with the sentence on all six counts to begin and run concurrently. The sentence on all counts was made subject to Title 18, United States Code, Section 4208 (a) (2). The appellant was further ordered to pay a fine of \$500 as part of the sentence in Counts One, Three and Five [C. T. 38].

Appellant filed a timely Notice of Appeal on October 23, 1967 [C. T. 47].

The jurisdiction of the District Court was predicated on Title 18, United States Code, Sections 495 and 1708. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 495 of Title 18, United States Code, provides in pertinent part as follows:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving or of enabling any other person, either directly or indirectly, to

obtain or receive from the United States or any officers or agents thereof, any sum of money . . . " shall be guilty of an offense.

Section 1708 of Title 18, United States Code, provides in pertinent part as follows:

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or . . .

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted . . . " shall be guilty of an offense.

III

STATEMENT OF THE CASE

Appellant was indicted on July 27, 1967, by the Federal Grand Jury for the Southern District of California, Central Division. Counts One, Three and Five of the six-count indictment charged that the appellant unlawfully had in his possession, on July 16, 1965, August 10, 1965, and September 11, 1965, the contents of letters he knew had been stolen from the mail. Counts Two, Four and Six of the indictment charged the appellant with forging the endorsement of payees on three United States Treasury checks [C. T. 2].

The appellant waived a trial by jury and a court trial was held on August 16, 1967, before the Honorable Peirson M. Hall, at which time the appellant was found guilty of all six counts of the indictment [C. T. 21].

On September 18, 1967, the trial court, on its own motion, appointed a psychiatrist to conduct an examination as to the appellant's mental competency both at the time of the offense charged and at the time of trial [C. T. 22-23]. The psychiatrist prepared two reports, which were filed with the court on October 9, and October 23, 1967 [C. T. 26, 39].

On October 23, 1967, the appellant was sentenced as indicated in the Jurisdictional Statement.

Appellant filed a timely Notice of Appeal on October 25, 1967 [C. T. 47].

IV

STATEMENT OF FACTS

Norman Gary Whitley was called as a witness by the Government and testified that he was employed as a mail carrier until January, 1966, when he was discharged for stealing mail [R. T. 17]. ^{2/}

Starting in May, 1965, he gave to the appellant United States mail containing United States Treasury checks addressed to payees J & O Kesse, Hans J. Christensen and others, in exchange for cash from the appellant [R. T. 20, 25, 34].

The Government called as witnesses, payees of two of the Treasury checks, Odessa Kesse and Brenda L. Scott. Each testified that she did not know the appellant, did not receive the Treasury check addressed and made payable to her, did not authorize the appellant to sign her endorsement to the check, and did not authorize the appellant to cash the check [R. T. 46-48 and 80-82].

Victor DiLoreto, Jr., a postal inspector, was called as a Government witness and testified that on May 3, 1967, he interviewed the appellant and at that time the appellant was shown the United States Treasury checks marked as Government's Exhibits 1, 2 and 3, and denied signing the endorsements of the payees, but admitted signing his own signature as the second

^{2/} "R. T." refers to Reporter's Transcript.

endorsement on each check and that the checks went through his bank account [R. T. 60-63].

Exemplars of the appellant's known handwriting were admitted into evidence by stipulation [R. T. 64].

Simeon Wilson, a qualified Government handwriting expert, was called as a Government witness and testified that he had conducted an examination of the handwriting on the back of the checks admitted in evidence and made a comparison of this handwriting with appellant's known handwriting. Mr. Wilson testified that the endorsements of the payees and the second endorsements in the name of William Andrews were written by the appellant [R. T. 78].

The appellant, William Duke Andrews, testified in his own behalf that during 1965 he ran a check cashing service and cashed approximately \$4000 worth of checks. He denied that he signed the endorsement of the payees on the Treasury checks admitted into evidence [R. T. 90-91, 94-95]. Appellant claimed he could not remember if he deposited Government Exhibit 2 in his savings account or if he prepared the deposit slip [R. T. 97-98]. He alleged that Mr. Whitley had authority to withdraw money from his savings account, but this was denied by Mr. Whitley [R. T. 98, 125-126].

After cross-examination of the appellant was completed, the trial Court questioned him in part as follows:

"THE COURT: By the way, you say you are collecting total disability?

"THE WITNESS: Yes, sir.

"THE COURT: What is your disability?

"THE WITNESS: Total disability.

"THE COURT: What is the matter with you?

"THE WITNESS: I can't think of the term they used.

"THE COURT: Does your back hurt?

"THE WITNESS: No, it is my head. I got shell-shocked when I was in the service.

"THE COURT: Is there something wrong with your head? Are you all right now?

"THE WITNESS: I think I am, sir.

"THE COURT: I mean, is there some question about your competency to understand this trial and know what is going on?

"THE WITNESS: I wouldn't think so, sir. [R. T. 116]

* * *

"THE COURT: So what are you doing now?

"THE WITNESS: Right now I am doing yard and lawn work.

"THE COURT: You mean piece work?

"THE WITNESS: Piece work.

"THE COURT: You have regular customers?

"THE WITNESS: I have regular customers.

"THE COURT: How many can you take care of

in a month?

"THE WITNESS: I can take care of a lot more than I do, but the regular customers are about, I would say, nine or ten a month.

*

*

*

"THE COURT: Did you tell your counsel that you were disabled because of an injury to your head?

"THE WITNESS: Yes, sir.

"THE COURT: And that you were shell-shocked?

"THE WITNESS: It isn't shell shock, I am trying to get the word, they call it dementia praecox.

"THE COURT: Dementia praecox?

"THE WITNESS: Yes, sir.

"THE COURT: Were you aware of this counsel?

"MR. MIRECKI: No, I was not aware of it. He told me he was getting a Government check but never told me what for, your honor.

"THE COURT: I see.

"You are satisfied that you are mentally competent and you understand these proceedings?

"THE WITNESS: Yes, sir, I think I do.

"THE COURT: And you have been able to assist your counsel in your defense?

"THE WITNESS: Yes, sir.

"THE COURT: Has he given any indication of his inability to understand the proceedings, counsel,

or to assist you in any way?

"MR. MIRECKI: No.

"May I ask him if he will waive the attorney and client privilege for a minute, your Honor?

"THE COURT: Yes.

"MR. MIERCKI: May I speak to the court about what we spoke of up in Mr. Shekoyan's office?

"THE COURT: Yes?

"MR. MIRECKI: I told the defendant that I didn't think that we should go to trial, in fact when I left the court here yesterday I spoke to Mr. Andrews and explained to him about Mr. Black and everything else, and the defendant insisted on going to trial. I stayed up last night trying to prepare for this case based on what he wanted. Now I realize the handicap I have been under, and I have been appointed, your Honor.

"THE COURT: I understand that.

"MR. MIRECKI: And he never told me about his disability.

"THE COURT: My only point is whether or not at the present time there is some question concerning his mental competence, because if there is why I should have him examined by a psychiatrist. My only question to you is not what you have advised him to do, which I will disavow, but whether or not he has

given any indication to you that he couldn't understand the proceedings and he has been able to tell you what he wanted about this case.

"MR. MIRECKI: No. He has been in fact trying to call too many shots here." [R. T. 118-120].

On September 18, 1967, the date originally set for sentencing the appellant, the trial court ordered that the appellant be examined as to mental competency by a court-appointed psychiatrist [C. T. 22-23]. The initial report of the psychiatrist found: "The defendant is presently sane. He is able to understand the proceedings against him and is capable of assisting counsel in his own defense. He was legally sane at the time of the alleged acts' alleged commission, and was legally sane at the time of present examination." [C. T. 35]. Subsequently, the appellant's Veterans Administration Medical file, dating back to 1944, was reviewed by the court-appointed psychiatrist and he filed a supplemental report with the trial court stating:

"After reading these records, the examiner is unconvinced that this defendant has ever suffered any form of mental illness which resulted either from his boxing or from his military service in which he had no combat duty. The defendant is, in my opinion, a clever manipulator. My diagnosis continues as in the first report." [C. T. 44].

On October 23, 1967, the two reports of the psychiatrist were admitted into evidence and the appellant was allowed to read a letter he had written for the court's attention [R. T. 133-136]. The court also indicated that it had read and considered prior letters addressed to the court by the appellant [R. T. 133]. The court further indicated that it had read the probation report and was considering it as well as the observation of the appellant during the trial and while he was on the witness stand [R. T. 137].

The appellant presented no other evidence at the time of the hearing. The appellant did not seek to raise mental incompetency as a defense at the time of trial, but rather denied same.

V

ISSUE PRESENTED

Was the trial court's determination of competency arbitrary and unwarranted?

VI

ARGUMENT

The only contention of appellant on appeal is that the trial court simply adopted the determination of the psychiatrist who examined the appellant as its conclusion that the appellant was mentally competent to understand the proceedings against him and to assist his counsel in his defense.

This contention is clearly untenable as the facts of the case indicate. During the trial the appellant did not offer any evidence relating to his mental competency. Only after the appellant had finished his testimony did the court, on its own, question the appellant concerning his mental competency. Even then, both the defendant and his counsel affirmed that the appellant understood the proceedings, was able to assist his counsel, and was mentally competent. (The colloquy between the court and the appellant and his counsel is set forth in the Statement of Facts, hereinabove.)

Furthermore, on October 23, 1967, when a hearing on the psychiatric examination was held, and before the appellant was sentenced, the trial court stated that it was considering the psychiatric report, the probation report, the letters that the appellant had written to the court, the appearance and statements of the appellant on the witness stand during the trial, and the letter read to the court by the appellant, in concluding that the appellant was mentally competent and understood the proceedings at the time of trial [R. T. 137].

The appellant's contention that the court simply adopted the psychiatrist's findings is apparently based on the fact that the court reiterated the psychiatrist's conclusion that the appellant was a clever manipulator [R. T. 137, C. T. 44]. The appellant offered no evidence other than his statement to the court on October 23, 1967, concerning his mental competency. The record is clear that the court reviewed and considered all the evidence before it in reaching the conclusion that the appellant was mentally

competent.

Under Section 4244 of Title 18, United States Code, the duty and responsibility of determining whether a defendant who has a mental illness or defect is or is not competent to stand trial is that of the trial court and his determination in that regard can not be set aside on review unless clearly arbitrary or unwarranted.

Dusky v. United States, 271 F.2d 385, 397 (8th Cir. 1959), reversed on other grounds, 362 U.S. 402.

The facts are clear that the trial court's determination was neither arbitrary nor unwarranted. Mental competency was never raised as an issue in the proceedings.

In proceedings under Title 18, United States Code, Section 4244, if the psychiatrist's report finds the defendant competent, the matter may end there, for, so far as the statute is concerned, the trial court is not required to hold a hearing to determine the defendant's present competency even though the defendant may wish to contest the report's conclusion.

Stone v. United States, 358 F.2d 503, 506 (9th Cir. 1966);

Meador v. United States, 332 F.2d 935, 936 (9th Cir. 1964);

Formhals v. United States, 278 F.2d 43, 48 (9th Cir. 1960).

The appellant was found competent by the psychiatrist [C. T. 35, 44].

VII

CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

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Chief, Criminal Division

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United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ James E. Shekoyan
JAMES E. SHEKOYAN

No. 22528 ✓

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FOR THE NINTH CIRCUIT

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, SECRETARY OF THE NAVY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22528

JAMES G. RUSSELL,
Appellant,
v.

PAUL H. NITZE, SECRETARY OF THE NAVY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This action was instituted in the district court on June 12, 1967, by James Russell who had been discharged from the United States Navy for engaging in homosexual conduct. Russell, admitting that he engaged in the conduct, but asserting that the Navy Discharge Review Board abused its discretion in failing to change his discharge from undesirable to general or honorable, sought an order in the nature of a writ of mandamus directing the Secretary of the Navy to change his discharge from undesirable to honorable or general. He alleged that the district court had jurisdiction under 28 U.S.C. 1361. On October 27, 1967, the district court granted summary judgment

for the Secretary on the ground that the complaint failed to state a claim under which relief could be granted (R. 101).

Notice of appeal was filed on December 22, 1967 (R. 105). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. The Pertinent Facts

On October 30, 1962, the appellant, James G. Russell, enlisted in the United States Navy for a term of four years (R. 12). After completion of the basic training program prescribed for all recruits he was transferred to the United States Naval Hospital in San Diego, California for specialized training (R. 16).

In May 1963, an investigation by the hospital's security office uncovered the possibility that Russell had engaged in homosexual conduct on Navy premises. Based upon information contained in the investigation report, Russell was called into the hospital's security office and informed that he was suspected of having engaged in homosexual conduct in violation of the Uniform Code of Military Justice, as amended, 10 U.S.C. 801 et seq. ^{1/} (R. 41). At that time, pursuant to regulations he was informed of his right to remain silent and advised that

^{1/} See, Art. 125 UCMJ, 10 U.S.C. 925 (sodomy); Art. 134 UCMJ, 10 U.S.C. 934 (discreditable conduct).

any statements he made could be used against him ^{2/} (R. 41). Nevertheless, Russell responded freely to questioning and admitted having engaged in a sodomous act with another enlisted man (R. 41).

Subsequently, on June 4, 1963, Russell executed a written statement in which he acknowledged that he had been informed of his rights under the Uniform Code of Military Justice, that he understood that he was under no obligation to make any statement **whatsoever** regarding the offense, and that he knew he could not be compelled to answer any incriminating questions. He also acknowledged that no force, coercion, threats, or promises had been used or made in order to induce him to issue a statement (R. 43). In the statement Russell again admitted to having engaged in homosexual activity. In sole explanation he stated that he had allowed his curiosity to affect his judgment but that throughout, he had remained the passive partner (R. 44).

Sometime after the issuance of this statement, Russell was informed that he was being considered for an administrative discharge under other than honorable conditions. ^{3/} On June 12, 1963,

2/ Bureau of Navy Personnel Manual, 32 C.F.R. 730.12; Cf., Art. 31 UCMJ, 10 U.S.C. 831.

3/ Under current Navy Regulations, 32 C.F.R. 730.1 et seq., there are five types of discharges. Three of them -- honorable, general and undesirable -- may be granted administratively. 32 C.F.R. 730.2. Two of them -- bad conduct and dishonorable -- may be given only via court-martial. Id.

about one week after issuing his first statement, Russell signed another document in which he recorded his understanding that he was being considered for a discharge under other than honorable conditions (R. 51). He stated that he had been afforded the opportunity to request, but was expressly waiving the following rights (R. 51):

- (a) to have his case heard by a board of not less than three officers

- (b) to appear in person before the board

- (c) to be represented by counsel.

However, the right to issue a statement in his own behalf was reserved and exercised, and on the same day, June 12, Russell issued a second statement (R. 48-50). At the beginning of the statement, he acknowledged that (R. 48):

I have been advised that I may be discharged under other than honorable conditions and the reasons therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudices in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

After the foregoing, Russell again admitted freely that he had engaged in homosexual activity (R. 48-51).

On June 17, 1963, the Commanding Officer of the hospital forwarded the case to the Chief of Naval Personnel, accompanied by his recommendation that Russell be given a general discharge for reasons of unfitness (R. 38). On July 1, a three member

Discharge Board, after considering the case, unanimously recommended that Russell be given an undesirable discharge by reason of unfitness (R. 36). This decision was approved by the Chief of Naval Personnel (R. 36) who, on July 15, directed that Russell be granted an undesirable discharge by reason of unfitness. On July 29, 1963, Russell was officially separated from the Navy on that basis (R. 26).

B. Proceedings Before the Navy Discharge Review Board

Three years later, on July 11, 1966, Russell applied to the Navy Discharge Review Board seeking to have the nature of his administrative discharge altered ^{4/} (R. 77). At that time, Russell enclosed an additional statement with his application for review, again admitting having engaged in homosexual conduct and offering the excuse of "youthful indiscretion" (R. 78). In support of his application, he offered a psychological report and statements by certain prominent members of his community (R. 77). Although he waived a personal appearance (R. 77), he did exercise the right to be represented by counsel and, in fact, was represented not only by his present counsel, Mr. Hobdey, but by appointed counsel as well (See R. 70, 79).

On August 12, 1966, Russell's appointed counsel requested that, in addition to a consideration of the record before the

^{4/} The Navy Discharge Review Board is an administrative board authorized by 10 U.S.C. 1553, supra, with authority to correct or modify the nature of any discharge or dismissal in accordance with the facts presented to it.

Board, the following factors be examined:

1. Russell's youth and immaturity,
2. his small town background and limited exposure to homosexuals, and
3. Russell's ignorance (R. 70).

No additional testimony or evidence relating to the acts in question or circumstances of discharge was offered.

By decision of August 16, 1966, the Navy Discharge Review Board determined that the character of the original discharge was proper, and that no correction or modification of the undesirable discharge was warranted. The Board stated (R. 68)

Petitioner voluntarily admitted participating in an act of sexual perversion while in the naval service. By so doing, petitioner thereby classified himself as unfit for the close association with members of the male sex necessitated by the requirements of naval service. The Board concludes that the character of the discharge was proper. No evidence was adduced to justify any change in Petitioner's discharge.

This decision was approved by the Secretary of the Navy on September 19, 1966 (R. 68), and this action ensued.

C. Proceedings in the District Court

As noted, Russell filed his complaint on June 12, 1967 (R.1), alleging that the Discharge Review Board's refusal to change the nature of the discharge was arbitrary and capricious and seeking mandamus to compel the Secretary to issue an honorable or general discharge. On October 6, the Secretary moved for summary judgment upon the grounds of lack of

In his response Russell asserted that, in view of his youth and lack of wisdom, the Navy Discharge Review Board had been arbitrary in refusing to amend the character of his discharge (R. 93, 98). Russell also contended, for the very first time, that after being advised that his commanding officer was recommending a general discharge, he decided to waive the right to counsel (R. 98). No supporting affidavits were offered.

On October 27, 1967, the district court entered summary judgment for the Secretary. In its memorandum opinion the court, noting that all administrative proceedings were conducted in full conformity with controlling administrative regulations (R. 102), held that the determination of the nature of a discharge from the armed services is a discretionary activity of the Secretary and, hence, not subject to control by mandamus. Accordingly, the complaint was dismissed for failure to state a cause of action (R. 103). This appeal followed (R. 105).

STATUTES AND REGULATIONS INVOLVED

§ 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, as amended, 10 U.S.C. 1553, provides:

1553. Review of discharge or dismissal

(a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his

department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

28 U.S.C. 1361 provides:

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Bureau of Navy Personnel Manual, reprinted in the Code of Federal Regulations, provides in pertinent part:

32 C.F.R. 724.1 Authority

A board for the review of discharges and dismissals of former personnel of the Navy and Marine Corps is established by the Secretary of the Navy pursuant to Title 10, United States Code, section 1553. To carry out the duties imposed by section 1553, administrative regulations and procedures are formulated in this part.

32 C.F.R. 724.2 Jurisdiction.

(a) In accordance with the precept of the Secretary of the Navy, the Navy Discharge Review Board, has been established within the Department of the Navy

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32 C.F.R. 724.5 Methods of presenting case.

The petitioner may present his case:

(a) By affidavit and/or other documents.
(See § 724.15(e) (3).)

(b) In person, with or without counsel.

(c) By counsel.

(d) Or by a combination of the above.

32 C.F.R. 724.6. Counsel.

As used in this part, the term "counsel" will be construed to include members in good standing of a Federal Bar or the Bar of any State, accredited representatives of Veterans organizations recognized by the Administrator of Veterans' Affairs under Title 38, United States Code, section 3402, and such other persons as, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for review, unless barred by law.

32 C.F.R. 730.10. Discharge of enlisted personnel by reason of unsuitability.

(a) Members may be separated, by reason of unsuitability, with an honorable or general discharge as warranted by their military records. A discharge by reason of unsuitability in accordance with the provisions of this section, regardless of the attendant circumstances, will be effected only when directed by or authorized by the Chief of Naval Personnel.

(b) Members may be discharged by reason of unsuitability because of:

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(7) Homosexual or other aberrant tendencies.

32 C.F.R. 730.12 Discharge of enlisted personnel by reason of unfitness.

(a) Members may be separated by reason of unfitness with an undesirable discharge, or with a more creditable type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of unfitness regardless of the attendant circumstances, will be effected only when authorized by the Chief of Naval Personnel.

(b) Members whose military records are characterized by one or more of the following may be recommended for discharge by reason of unfitness:

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(5) Homosexual acts. (SECNAV Instruction 1900.9 series sets forth controlling policy and additional action required in cases involving homosexuality.)

(6) Other sexual perversion including but not limited to (i) lewd and lascivious acts, (ii) sodomy, (iii) indecent exposure, (iv) indecent acts with or assault upon a child, or (v) other indecent acts or offenses.

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(d) In each case processed in accordance with this section, the individual is subject to an undesirable discharge. The member must be informed in writing as to the circumstances which are the basis for the contemplated action and must be afforded an opportunity to request or waive in writing any or all of the following

privileges: (If not on active duty, this may be accomplished by registered mail.)

(1) To have his case heard by a board of not less than three officers.

(2) To appear in person before such board (unless in civil confinement or otherwise unavailable).

(3) To be represented by counsel.

(4) To submit statements in his own behalf.

(5) To waive in writing the rights listed in subparagraphs (1) to (4) of this paragraph.

Prior to declaring his intentions concerning the rights listed in this paragraph (and prior to requesting a discharge to escape trial by court-martial in cases processed under paragraph (b)(5) of this section the member shall be afforded the opportunity to consult with counsel. If the individual requests that his case be heard by a board of officers, the commanding officer shall convene a board in accordance with § 730.15. In the event the individual refuses to request or waive his privileges, make a page 13 entry of explanation in the individual's service record and forward a copy of the page 13 along with other enclosures to the Chief of Naval Personnel.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT
MANDAMUS WOULD NOT LIE TO COMPEL APPELLEE
TO CHANGE THE CHARACTER OF APPELLANT'S DISCHARGE

Russell's main contention in this Court is that the Navy Discharge Review Board's refusal to change his discharge from undesirable to general is arbitrary and capricious because the Board refused to consider his youth and lack of wisdom, and ignored a psychological report suggesting that Russell is not a homosexual. It is also asserted that, at the time of his discharge, Russell waived the right to counsel after being informed that his Commanding Officer was recommending a general discharge. Based on these considerations, it is urged, the district court erred in declining to compel the Secretary of the Navy to issue a general -- or honorable -- discharge.

We show below that the district court, under traditional principles of judicial review of decisions of military tribunals, correctly held that mandamus would not lie in this case.

- A. Judicial Review of Military Administrative Discharges Is Limited to Insuring That the Procedures and Decisions of the Military Tribunal Are Permitted By Law And Is Unavailable to Oversee Discretionary Decisions of Military Tribunals or Officials.

It is well settled that the judiciary will not normally interfere with military decisions made in pursuit of legitimate military goals. This principle was set forth by Mr. Justice J

In Orloff v. Willoughby, 345 U.S. 83, as follows:

. . . judges are not given the task of running the Army. * * * [O]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. 345 U.S. 83, 93-94.

Obviously, this refusal to oversee military matters flows from a keen awareness that judicial intervention in the internal affairs of the military could seriously undermine the high level of discipline and morale that are so indispensable to the efficient functioning of our armed forces. The Supreme Court, recognizing this, has held that -- subject to extremely limited exceptions -- decisions of duly constituted military tribunals may not be judicially reviewed. See, Quackenbush v. United States, 177 U.S. 20. The first exception is that the federal courts may inquire into the jurisdiction of the military tribunal to render the decision in question. In re Yamashita, 327 U.S. 1; In re Grimley, 137 U.S. 147; Dynes v. Hoover, 61 U.S. 65. And second, the courts may examine the decisions reached, as well as the procedures employed, to insure their permissibility under law. See Reaves v. Ainsworth, 219 U.S. 296; Johnson v. Sayre, 158 U.S. 109. But having determined that there are no defects as to jurisdiction and procedure, and that the action taken is permitted by law, judicial review is at an end. United States ex rel. French v. Weeks, 259 U.S. 326; Johnson v. Sayre, supra.

That these principles apply with equal vitality in the area of administrative discharges cannot be doubted. Reed v. Frank, 297 F. 2d 17, 20 (C.A. 4); Courtney v. Secretary of the Air Force, 267 F. Supp. 305, 311 (C.D. Calif.). See, Payson v. Franke, 282 F. 2d 851, 854 (C.A.D.C.); cf., Michaelson v. Herr, 242 F. 2d 693, 696 (C.A. 2; concurring opinion of Judge Medina); Gentila v. Pace, 193 F. 2d 924 (C.A.D.C.), certiorari denied 342 U.S. 943.^{5/} As stated in Reed, supra, 297 F. 2d at 20:

The [legality] of the discharge procedure is a justiciable issue but once the plaintiff's claim is found and declared to be without merit, the discharge procedure may continue as before. Here, . . . there is no direct judicial review of the administrative proceedings except insofar as necessary to determine the legality of prescribed administrative procedure. It is the basic procedure . . . which may be reviewed. (Court's emphasis.)

Moreover, considering the requirements of discipline, morale and efficiency in the armed services, the scope of judicial review of military discharges should certainly be no greater (if as great) than the scope of judicial review of federal employment civilian discharges. And, with respect to the latter, this Court has consistently held that judicial review is limited to

5/ Indeed it is apparent that some decisions of military tribunals are completely unreviewable. Thus, under Article 76, Uniform Code of Military Justice, 10 U.S.C. 876, court-martial convictions may not be reviewed at all except by way of constitutionally guaranteed habeas corpus proceedings. H.Rept. No. 491, 81st Cong., 1st Sess., p. 35; S. Rept. No. 486, 81st Cong., 1st Sess., p. 32. Yet, even in such proceedings, where life and liberty are at stake, the scope of review is exceedingly narrow. Burns v. Wilson, 346 U.S. 137.

determining whether applicable statutes and procedures have been complied with. See, e.g., Mancilla v. United States, 382 F. 2d 269 (C.A. 9); Brancadora v. Federal National Mortgage Ass'n., 344 F. 2d 933 (C.A. 9); Seebach v. Cullen, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972. Since the scope of review is limited in those cases, we submit that, a fortiori, it is so limited when reviewing decisions concerning military personnel.^{6/}

Nevertheless, despite the foregoing, appellant insists that 28 U.S.C. 1361, granting mandamus jurisdiction to all district courts, authorized the lower court to compel the Secretary to issue a more favorable discharge. This contention is completely devoid of merit.

It is clear that mandamus will issue only to compel the performance of ministerial acts. It will not lie to control an exercise of discretion by the executive branch of the Government. Panama Canal Co. v. Grace Line Inc., 356 U.S. 309; United States v. Wilbur, 283 U.S. 414; Houston v. Ormes, 252 U.S. 469; Alaska Smokeless Coal Co., v. Lane, 250 U.S. 549;

6/ Ashe v. McNamara, 355 F.2d 277 (C.A. 1), cited by appellant is fully consistent with these principles. In that case, the decision of the military tribunal was overturned because reached by procedures not permitted by law. Other instances in which the procedures utilized by the military have been found defective include Harmon v. Brucker, 355 U.S. 579; Van Bourge v. Nitze, 388 F. 2d 557 (C.A.D.C.) and Bland v. Connally, 293 F. 2d 852 (C.A.D.C.). But in each of the latter cases, the courts, having performed their assigned task of inquiring into the propriety of the procedures used, took no action on the merits but, remanded the case to the military for disposition under valid procedures.

Ness v. Fisher, 223 U.S. 683; Riverside Oil Co. v. Hitchcock,
190 U.S. 317; Marbury v. Madison, 1 Cr. 137.^{7/}

This rule is equally applicable to military administrative boards whose decisions are discretionary in nature. Denby v. Berry, 263 U.S. 29; see, Runkle v. United States, 122 U.S. 54. Thus, in United States ex rel. French v. Weeks, 259 U.S. 326, a former soldier sought mandamus to compel an Army classification board to change the nature of his discharge classification. The Court's holding that federal courts lacked the authority to compel

^{7/} This Court has been called upon many times to apply these principles. See, e.g., Finley v. Chandler, 377 F. 2d 548 (C.A. 9), certiorari denied, 389 U.S. 869; Edmunds v. Board of Examiners of Optometry, 106 F. 2d 904 (C.A. 9).

Nor does 28 U.S.C. 1361 change this result. Prior to 1961 mandamus actions against Government officials were capable of being brought only in the District of Columbia. In order to allow such actions to be instituted throughout the rest of the country as well, Congress passed § 1361 as a venue provision giving all district courts mandamus jurisdiction. See, 2 Moore Federal Practice, § 4.29. But in so doing, Congress made it plain that "This legislation does not create new liability or new causes of action against the United States government." S.Rept. No. 1992, 87 Cong. 2d Sess., p. 2. See, 108 Cong. Rec. 20078. Thus, it is plain that the scope of mandamus relief theretofore existing, as well as the principles governing its issuance, remained unchanged by the new section. White v. Administrator of General Services Administration, 343 F. 2d 444 (C.A. 9); Rural Electrification Administration v. Northern States Power Co., 373 F. 2d 686 (C.A. 8), certiorari denied, 387 U.S. 945; Prairie Band v. Udall, 355 F. 2d 364 (C. 10), certiorari denied, 385 U.S. 83.

such an act the Supreme Court stated:

Thus we have lawfully constituted military tribunals . . . and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. (Emphasis added.)
259 U.S. 335.

See also, United States ex rel. Creary v. Weeks, 259 U.S. 336.

We think it significant, moreover, that such holdings are entirely consonant with Congress' intent that, at least where applicable procedures have been followed, the Navy Discharge Review Board be permitted to exercise a broad discretion not subject to judicial control.

Prior to 1944 an aggrieved member of the military, seeking to have the nature of his military discharge amended, had no recourse other than to private act of Congress. See, 40 Op. Atty. Gen. 504. At that time, the Congressional prerogative to grant or withhold clemency was not subject to review by the courts but, of course, was final.

In 1944, in order to shift the burden of considering the growing number of applications for review of discharges from it to the military, Congress passed § 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 284, 286, as amended, 10 U.S.C. 1553, setting up military discharge review boards such as the Navy Board in this case. In establishing this procedure, judicial review from the decisions of the boards was not provided for. Indeed, presumably to insure that the final prerogative

in such matters would be transferred exclusively to the military. Congress amended its original bill to provide expressly that the findings of these boards were to be final subject only to review by the Secretary. 58 Stat. 286.^{8/} The net result, as seen by the Attorney General, was that:

The correction of the record and the issuance of a new discharge [by the military] may be regarded as acts of clemency, or in mitigation, precisely comparable in effect to a successful appeal to the Congress for relief ^{9/} by private act. 40 Op. Atty. Gen. 504, supra.

Consequently, review of military discharges was transformed from a legislative into an executive -- not a judicial -- function.

^{8/} See H.Rept. No. 1418, 78th Cong., 2d Sess (1944); 90 Cong. Rec. 3082; 90 Cong. Rec. 4333. In 1962, § 1553 was reenacted without substantive change. 76 Stat. 509. Cf. Michaelson v. Herren, 242 F. 2d 693 (C.A. 2); Updegraff v. Talbott, 221 F. 342 (C.A. 4); Gentila v. Pace, 193 F. 2d 924 (C.A.D.C.), supra.

^{9/} See, Hearings Before the House Committee on World War Veterans Legislation (S. 1767), 78th Cong., 2d Sess. pp. 11-12, 40-41. In 90 Cong. Rec. 4538, appears the following statement by Rep. McCormack, a member of the Committee:

We felt some machinery should exist in the Navy Department and the War Department whereby veterans could have a review without the necessity of having their discharges corrected by specific acts of Congress. I consider this provision a powerful contribution in the right direction.

^{10/} Two years later Congress completed the task begun in 1944 by enacting the Legislative Reorganization Act of 1946, 60 Stat. 812. Under § 207 of the Act, 60 Stat. 812, 837, boards for the correction of military records were established as further avenues of recourse within the military. By § 131, 60 Stat. 812, 831 Congress, evidently pleased with the results achieved under the new military boards, completely ended its former practice of itself reviewing applications for changes of discharge. The current version of that enactment appears in 10 U.S.C. 1552.

Thus, the holdings of the courts and the mandate of Congress compel the same conclusion -- that the prerogatives which had formerly been committed solely and exclusively to Congress have been transferred intact to the military and (barring determinations or procedures unauthorized by law) remain beyond control by the judiciary. ^{11/}

B. Since Russell's Complaint Sought Nothing More Than Review of An Exercise of Discretion By the Military, the District Court Correctly Held That No Cause of Action Was Stated.

In light of the foregoing, it is clear that the district court could not have granted the relief requested. Appellant makes no claim that the Discharge Review Board failed to afford him any procedures or rights to which he was entitled. Indeed, it is clear that he was granted all the procedural rights set forth in the Bureau of Naval Personnel Manual. Thus, he submitted supplementary statements along with his application for review. 32 C.F.R. 724.3. He was granted, but waived, a personal appearance (R. 77). 32 C.F.R. 724.5. However, he did elect to retain counsel and was represented simultaneously by two separate attorneys at the time of the Board proceedings.

^{11/} Appellant asserts that since military regulations prescribe the exact nature of the discharge to be granted, under any particular situation, the decision of the Board, having to conform to those regulations, is not discretionary but ministerial. This contention was rejected in Work v. United States ex rel. Rives, 267 U.S. 175, 177, where the Supreme Court expressly noted that an act is no less discretionary just because the discretion must be exercised within limits.

Nor is there any claim that the Board procedures were otherwise outside the scope of constitutional, statutory or departmental authority in any way.

Nevertheless, appellant's principal contention here is that the decision itself of the Discharge Review Board was arbitrary because it failed, despite his youth and lack of wisdom, to upgrade the character of his discharge. But it is perfectly evident that, in this regard, appellant is really asking the courts to oversee the Board's exercise of discretion. Of course, in light of the principles discussed, the district court properly declined to consider this matter. Brown v. McNamara, 387 F.2d 150 (C.A. 3); Ingalls v. Brown, 377 F. 2d 151 (C.A.D.C. 10). As stated in Fowler v. Wilkinson, 353 U.S. 583, 584:

If there is injustice in the [sanction] imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion. That power is placed by Congress in the hands of those entrusted with the administration of military justice or if clemency is in order, the Executive. (Emphasis supplied.)

It is also suggested by appellant that, if homosexuality was the basis for the discharge, the Discharge Review Board was required to record its finding that he was in fact a homosexual (Br. 7). See 32 C.F.R. 724.17. In this connection, it is also alleged that the Board improperly disregarded a psychological report stating that Russell was not a homosexual.

However, it is clear that Russell was charged and dismissed for engaging in a homosexual act, not for being a homosexual. The Bureau of Naval Personnel Manual clearly distinguishes between the two. Thus, if a member of the armed forces is found to be homosexual or to have such tendencies, he may be granted an honorable or general discharge by reason of unsuitability. 32 C.F.R. 730.10. However, once he has actually committed a proscribed act, thereby violating the Uniform Code of Military Justice, he is subject to being separated as undesirable by reason of unfitness. 32 C.F.R. 730.12.

Appellant does not suggest, as he cannot, that this distinction is unreasonable or that it serves no valid military purpose. Certainly, therefore, since commission of a homosexual act was the basis for the discharge, the Discharge Review Board was not required to enter a finding regarding homosexuality, but only one that a homosexual act had been committed. This it clearly did (R. 68).

The psychologist's report, which was allegedly disregarded by the Board, did not negate the fact that Russell actually had committed a proscribed act. Its materiality related to the matter of clemency only. Here, there is no evidence that, in deciding whether or not clemency was appropriate, the Board failed to consider the report -- whose weight was a question for it, not for the court.

Finally, it is urged that there was some procedural irregularity connected with Russell's waiver of the right to counsel at the time of his discharge. We **note** initially that Russell had ample opportunity to raise this issue before the Discharge Review Board at which time he was represented, not only by his present counsel, but by service counsel as well. Since he failed to raise this issue then, he may not be heard to rely on it now. De Gorter v. Federal Trade Commission, 244 F. 2d 270 (C.A. 9); Pacific Gas & Electric Co. v. Securities and Exchange Commission, 139 F. 2d 298 (C.A. 12/ affirmed, 324 U.S. 826.

In any event, it is clear that at the time of his discharge Russell was meticulously advised of his right to counsel and that he knowingly and voluntarily waived it. He alleges no specific facts contradicting this.

After Russell was apprised of the charges against him, his Commanding Officer told him that he (the Commanding Officer) would recommend Russell for a general discharge. Subsequently Russell voluntarily waived the right to counsel. There is no suggestion or allegation that the Commanding Officer told

12/ Even at this late date appellant has additional recourse before the Board for the Correction of Naval Records. See, § 207, Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended, 10 U.S.C. 1552; 32 C.F.R. 723.1, et seq. This Board, composed entirely of civilians, as compared with the military personnel of the Discharge Review Board, has plenary authority to grant relief even where the Discharge Review Board has denied similar relief. 41 Op. Atty. Gen. 12; see 32 C.F.R. 723.3(c). Thus the issue of waiver validly may be presented to the military for its initial consideration.

Russell of the proposed recommendation in order to induce him to waive counsel. ^{13/} Nor is there any evidence that Russell failed to understand that his Commanding Officer's recommendation was nothing more than advisory and not binding upon the Discharge Board. Indeed it is certain Russell must have understood that his discharge might be not general, but something else because, on June 12, he issued a statement recording his understanding that he was being considered for a discharge under other than honorable conditions (R. 51). In another statement issued the same day, Russell stated that he had been advised that he might be discharged under other than honorable conditions and that that discharge could lead him to encounter substantial prejudice in civilian life. In no case did he ever specify that it was his impression that he would be given a general discharge.

Under these circumstances, it cannot be said that the Navy Discharge Review Board abused its discretion in declining to upgrade the nature of Russell's discharge. Nor can it be said that Russell who, to this very day, admits to having engaged in a homosexual act while in the Navy, was deprived of his right to elect to retain counsel. Rather, it is plain that Russell, regretting his conduct and with full knowledge of the possible

13/ The Commanding Officer did in fact recommend a general discharge but the Discharge Review Board determined upon an undesirable discharge (R. 38).

consequences, voluntarily waived this right. He cannot claim otherwise now. Courtney v. Secretary of the Air Force, supra

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, Jr.
Assistant Attorney General,

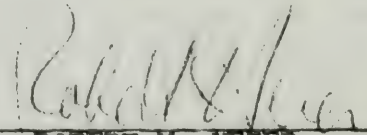
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JULY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



ROBERT M. HEIER

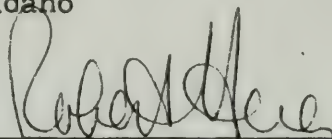
AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

ROBERT M. HEIER, being duly sworn, deposes and says:

That on July 5, 1968, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

Cecil D. Hobdey, Esquire
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ROBERT M. HEIER

Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and sworn to before
me this 5th day of July 1968.

[SEAL]


NOTARY PUBLIC

My Commission expires April 14, 1972.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 1 1959

CHARLES W. DENNIS,

Petitioner and Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
et al.,

Respondent and Appellee.

No. 22534

APPELLEE'S BRIEF

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FILED

JUL 1 1959

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UNITED STATES COURT OF APPEALS
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Petitioner and Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
et al.,

Respondent and Appellee.

No. 22534

APPELLEE'S BRIEF

JURISDICTION

Appellant, seeking review of an order of the District Court denying his petition for a writ of habeas corpus,^{1/} invokes the jurisdiction of this Court under Title 28, United States Code section 2253.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

On July 13, 1960, appellant Charles William Dennis was charged with a series of heinous crimes, i.e., assault with intent to commit murder (Cal. Pen. Code § 217), kidnapping with bodily harm (Cal. Pen. Code § 209), first degree robbery (Cal. Pen. Code § 211), and forcible rape (Cal. Pen. Code § 261, subd. 3), by indictment filed in the Superior Court of Riverside County. Upon arraignment appellant

1. A copy of this order is attached hereto as Appendix A.

entered pleas of not guilty and not guilty by reason of insanity and, on September 21, 1960, he was committed to Patton State Hospital pursuant to sections 1368 and 1370 of the California Penal Code (TR 40).^{2/}

On September 12, 1962, a bench warrant was issued by the superior court containing a certification by the superintendent of the Patton State Hospital that appellant was competent to stand trial and that he had left the hospital without permission. The certificate suggested appellant's return to the custody of the court (TR 40).

Appellant was eventually apprehended in Florida and was brought before the court for arraignment on September 24, 1962, at which time the public defender was appointed to represent him (TR 40).

On September 28, 1962, appellant, represented by the public defender, withdrew his former pleas and entered a plea of guilty to the charges under section 1192.3 of the California Penal Code.^{3/} Appellant waived time for sentence

2. These sections empower the trial court, in case of doubt as to a defendant's competency to stand trial, to try and determine the issue of his present sanity and if the defendant is found insane, to commit him to the state hospital for treatment until he is restored to competency.

3. That section provides as follows:

"Upon a plea of guilty to an information or indictment for which the jury has, on a plea of not guilty, the power to recommend, the discretion of imposing, or the option to impose a certain punishment, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty. Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant cannot be sentenced to a punishment more severe than that specified in the plea."

and was committed to prison that day (TR 40, 44-47).

Appellant did not appeal; his application to the California Supreme Court for a writ of habeas corpus was denied on October 13, 1965 (TR 6-7).

B. Proceedings in the Federal Courts.

On March 2, 1966, appellant filed a petition for a writ of habeas corpus in the court below (TR 1). That same day an order to show cause was issued (TR 33).

Appellees, respondents below, on March 25, 1966, filed a return to the order to show cause (TR 38). Appellant filed a traverse on April 13, 1966 (TR 53).

On December 16, 1966, the District Court filed a memorandum and order directing appellant to supply the court with additional facts bearing on his allegation that his plea of guilty was involuntary (TR 89). In the same order appellees were directed to supply the court with transcripts of all judicial proceedings relating to appellant and all medical reports bearing on his mental condition. A copy of this order is appended to this brief as Appendix B. On March 2, 1967, appellees filed the requested documents.^{4/}

On October 10, 1967, the District Court filed an order and opinion denying appellant's application for a writ of habeas corpus, discharging the order to show cause, and dismissing the proceedings (TR 125). By order dated

4. A copy of the transcript of the state proceedings at which appellant entered his plea is appended hereto as Appendix C.

November 3, 1967, his petition for rehearing was denied, however, he was granted until December 10, 1967, to file a notice of appeal (TR 158).

On January 15, 1968, appellant's notice of appeal was filed and that same day the District Court certified that there was probable cause to appeal and granted appellant's motion for leave to proceed in forma pauperis (TR 162-163).

STATEMENT OF FACTS

This case involves the collateral review of a conviction entered on appellant's plea of guilty. The procedural history of the case has been recited above, and since the District Court concluded that an evidentiary hearing was not warranted the precise question presented on appeal is whether petitioner's factual allegations, considered in the light of the state court records, stated grounds for relief on habeas corpus. These allegations were fairly summarized in the opinion of the District Court from which we quote as follows:

"Petitioner contends (1) that he was adequately represented by counsel, and (2) that his pleas of guilty to the above charges were involuntary, alleging in substance and effect that he was mistreated by officials after his arrest in July, 1960 and during his stay at Patton State Hospital; that after his return to court from Florida, his court-appointed counsel visited him for the first and only time on September 27, 1962; that the attorney, Mr. Biddle, had been a member

of the District Attorney's staff when petitioner was originally charged in 1960; that the attorney advised him that his case was serious, threatened petitioner's life with the gas chamber and pressured him into pleading guilty; that his attorney told him that his escape from the hospital had made everyone mad at him and, further, told him:

'That if petitioner would plead guilty, he, Mr. Biddle, could get petitioner life imprisonment. Mr. Biddle explained that California did not have such sentence as life without possibility of parole, that petitioner would be eligible for parole after seven years. He warned petitioner that if he plead guilty that the Presiding Justice would state life without possibility of parole but only for the benefit of public and that petitioner was not to become upset when the Judge state (sic) life without possibility of parole. But if petitioner wished to have him, counselor, fight the case petitioner would receive the death sentence, because everybody were (sic) mad as (sic) petitioner for running away from the hospital.' (Traverse 2d, p. 13).

"Petitioner further alleges in substance that

his counsel pointed out to him that he was a native of Georgia and expressed the view that 'if you were accused of raping and robbing white women and shooting a white man in Georgia - why I doubt whether you would have gotten to the jail'; that petitioner did not know what else to do but to let his counsel enter the pleas of guilty 'to charges petitioner did not commit.'" (TR 126-127).

APPELLANT'S CONTENTIONS

1. Appellant's allegation that his plea was involuntary required an evidentiary hearing.

2. Appellant's allegations respecting his relationship with his court-appointed attorney required an evidentiary hearing.

SUMMARY OF RESPONDENT'S ARGUMENT

The District Court properly denied appellant's petition because his allegations, considered in the light of the state records, did not state grounds for relief on federal habeas corpus.

ARGUMENT

APPELLANT'S PETITION DID NOT STATE GROUNDS FOR RELIEF ON HABEAS CORPUS

The assumption underlying the arguments in appellant's brief seems to be that the District Court necessarily erred when it denied his application without holding an evidentiary hearing. This assumption is erroneous, because a state prisoner is not entitled to an evidentiary hearing unless he comes forward with allegations of fact which would

warrant the granting of a writ of habeas corpus. See generally, Briley v. Wilson, 376 F.2d 802 (9th Cir. 1967). In the present case the court below, after careful consideration of petitioner's application and respondent's return to the order to show cause, directed respondent to produce all available records of the state court proceedings, and, what is significant for present purposes, requested appellant to file a supplement to his petition. In this request the court gave appellant detailed instructions as to the specific factual matters his supplement should contain. See Appendix B. The procedure followed by the District Court did not place upon appellant "any burden of complying with technicalities; it simply demand[ed] of him a measure of frankness in disclosing his factual situation." In re Swain, 34 Cal.2d 300, 304 (1949).

Only after examining the documents filed by the respective parties did the District Court, having satisfied itself that an evidentiary hearing would serve no purpose, proceed to deny appellant's petition for the writ. The question on appeal is whether that denial is correct. We submit that it was.

On this appeal, petitioner contends that his plea was involuntary for several distinct reasons. First, he contends that he pleaded guilty under the misapprehension that he had been promised a life sentence with the possibility of parole after seven years. There are two answers to this particular contention. First, as this Court has said,

"It has been held, and we agree, that mere disappointment at the severity of the sentence received upon a plea of guilty is no ground for habeas corpus or other similar relief even where defendant's counsel has expressed an opinion that leniency will be granted." Gilmore v. People of the State of California, 364 F.2d 916, 919 (9th Cir. 1966).

The second answer to petitioner's argument is that it appears with unmistakable clarity from the record of the entry of plea (Appendix C) that appellant entered the plea of guilty to the kidnapping charge with the stipulation that the punishment would be life imprisonment without possibility of parole and that this fact was clearly explained to him by the trial judge. Thus, the District Court could properly conclude that even if an evidentiary hearing were held and petitioner were permitted personally to testify to his allegation that he thought he would receive only a life sentence with the possibility of parole, denial of the writ would nonetheless be required in view of the clarity of state court record on this issue as well as the existing law that an expectation of leniency will not vitiate an otherwise voluntary plea. Gilmore v. People of the State of California, supra.

Petitioner also argues that he was in "an inherently coercive situation" (AOB 4), presumably because he was facing a capital charge, i.e., kidnapping with bodily harm. However, this Court has made it quite clear that the fact that

a defendant is charged with a capital offense does not render involuntary his plea of guilty entered in exchange for a lesser sentence. Gilmore v. People of the State of California, supra, 364 F.2d at 918.

Finally, appellant urges that a writ of habeas corpus should have been granted because the state court did not conduct an inquiry into his then present sanity at the time his plea was entered. Appellant does not now allege that he was insane at that time; however, he argues that "under the rule of Pate v. Robinson, 383 U.S. 375 (1966), there should have been some kind of hearing on appellant's mental state before he was convicted" (AOB 7). However, as pointed out by the District Court in its order, the Superior Court had before it a certification by the Superintendent of the Patton State Hospital that appellant had been found competent to stand trial but had left the hospital without permission. Unlike the situation in Pate v. Robinson, supra, at the time of the plea there was no suggestion by either appellant or his attorney that he was incompetent and therefore the trial court could properly proceed on the unchallenged assumption that petitioner was competent to stand trial.

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CONCLUSION

We respectfully submit that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: July 10, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

ALBERT W. HARRIS, JR.
Assistant Attorney General

ROBERT R. GRANUCCI
Deputy Attorney General

Attorneys for Respondent-Appellee

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CR-SF
66-313

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: July 10, 1968

ROBERT R. GRANUCCI
Deputy Attorney General

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A P P E N D I C E S

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OCT 11 1967

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES W. DENNIS,)
Petitioner,)
-vs-) No. 44833
PEOPLE OF THE STATE OF) O R D E R
CALIFORNIA, et al.,)
Respondent.)

This is a petition for a writ of habeas corpus filed herein under the provisions of 28 U.S.C. § 2241, by a prisoner at the California State Prison at San Quentin, now in custody of the Warden thereof under the commitment of the California Superior Court in and for the County of Riverside, California, finding him guilty, pursuant to his pleas of guilty to charges of assault with a deadly weapon with intent to commit murder (Cal. P. C. Sec. 217), forcible rape (Cal. P. C. Sec. 261.(3)), kidnapping for the purpose of robbery with the infliction of bodily harm (Cal. P. C. Sec. 209) and first degree robbery (Cal. P. C. Sec. 211).

On September 28, 1962, petitioner was sentenced to life imprisonment in the state prison without the possibility of parole as to the kidnapping offense (for which the punishment may be death or life imprisonment without the possibility of parole (Cal. P. C. Sec. 209), and to the terms prescribed by law as to the other offenses, all sentences to run concurrently.

On March 2, 1966, this Court issued an Order to

1 Show Cause; on March 25, 1966, respondent filed its Return;
2 and, on June 3, 1966, petitioner filed a Traverse to the
3 Return.

4 On December 16, 1966, this Court made its order
5 requiring petitioner to set forth more specific allegations
6 and on February 3, 1967, petitioner filed a Supplemental
7 Traverse to the Return.

8 It appears from the record that petitioner was
9 originally arrested on July 13, 1960 and indicted for the
10 offenses above set forth; that he entered pleas of not guilty
11 and also not guilty by reason of insanity; that on September
12 24, 1960, he was committed to Patton State Hospital by
13 the Superior Court upon a finding of doubt as to his then
14 present sanity; that petitioner escaped from Patton State
15 Hospital; that a court bench warrant, dated September 12,
16 1962, issued on the basis of an affidavit by the District
17 Attorney of Riverside County containing a certification by
18 the Superintendent of the Patton State Hospital to the
19 effect that petitioner had been found competent but had left
20 the hospital without permission, and suggesting petitioner's
21 return to the custody of the court.

22 Petitioner was eventually apprehended in Florida
23 and brought before the court for arraignment on September 24,
24 1962. The Public Defender, Mr. Biddle, was appointed to
25 represent petitioner and the case was set for trial or
26 further proceedings.

27 On September 28, 1962, represented by Mr. Biddle,
28 Public Defender, petitioner withdrew his former pleas of
29 not guilty and not guilty by reason of insanity and on the
30 same day was sentenced as already above set forth.

31 Petitioner contends (1) that he was inadequately
32 represented by counsel, and (2) that his pleas of guilty to

1 the above charges were involuntary, alleging in substance
2 and effect that he was mistreated by officials after his
3 arrest in July, 1960 and during his stay at Patton State
4 Hospital; that after his return to court from Florida, his
5 court-appointed counsel visited him for the first and only
6 time on September 27, 1962; that the attorney, Mr. Biddle,
7 had been a member of the District Attorney's staff when
8 petitioner was originally charged in 1960; that the attorney
9 advised him that his case was serious, threatened petition-
10 er's life with the gas chamber and pressured him into
11 pleading guilty; that his attorney told him that his escape
12 from the hospital had made everyone mad at him and, further,
13 told him:

14 "That if petitioner would plead guilty, he,
15 Mr. Biddle, could get petitioner life imprisonment. Mr. Biddle explained that California did
16 not have such sentence as life without possibil-
17 ity of parole, that petitioner would be eligible
18 for parole after seven years. He warned
19 petitioner that if he plead guilty that the
20 Presiding Justice would state life without
21 possibility of parole but only for the benefit
22 of public and that petitioner was not to become
23 upset when the Judge state (sic) life without
24 possibility of parole. But if petitioner wished
25 to have him, counselor, fight the case petition-
26 er would receive the death sentence, because
27 everybody were (sic) mad as (sic) petitioner for
28 running away from the hospital." (Traverse 2d,
29 p. 13).

30 Petitioner further alleges in substance that he
31 asserted his innocence of the crimes but that his counsel
32 pointed out to him that he was a native of Georgia and
33 expressed the view that "if you were accused of raping and
34 robbing white women and shooting a white man in Georgia -
35 why I doubt whether you would have gotten to the jail";
36 that petitioner did not know what else to do but to let his
37 counsel enter the pleas of guilty "to charges petitioner
38 did not commit".

39 Concerning petitioner's allegation that his attorney

1 had been a member of the District Attorney's staff when
2 petitioner was originally charged, the Reporter's Transcript
3 of September 28, 1962 (pp. 1-2) shows that this circumstance
4 was fully explained in open court and that defendant approved
5 of the appointment.

6 Petitioner's allegation that his attorney alluded to
7 the possibility of the gas chamber and to the circumstances
8 of the effect of his escape from Patton, and pressured him
9 into pleading guilty, does not amount to a substantial
10 allegation of coercion. The gas chamber was a real possibil-
11 ity because petitioner was charged with violation of Cal.
12 Penal Code § 209 (which provides the penalty of death or life
13 imprisonment without possibility of parole in cases where the
14 person subjected to kidnapping suffers bodily harm). It was
15 counsel's duty to frankly advise petitioner of all the
16 circumstances.

17 Concerning petitioner's contention that his attorney
18 was incompetent and that petitioner was denied adequate
19 representation by counsel, petitioner's allegations that his
20 counsel visited him but once does not necessarily amount to
21 a charge of inadequacy of representation.

22 There is nothing to indicate that counsel failed to
23 properly investigate and consider possible defenses. Nothing
24 is alleged that would negate the possibility that counsel's
25 information concerning the available evidence justified the
26 advice to plead guilty notwithstanding petitioner's alleged
27 assertion of innocence. Certainly, such advice should not
28 be presumed to have been given by the attorney through
29 incompetence or malice.

30 Petitioner's allegation that his attorney told him
31
32

1 that he would be eligible for parole on the kidnapping charge
2 in seven years, must be considered in the light of the pro-
3 ceedings at time of plea. (Reporter's Transcript (RT p. 3),
4 which proceedings were as follows:

5 'MR. BIDDLE: Count two, Your Honor, with
6 respect to count two, it is the defendant's
7 desire to enter a plea pursuant to Section 1192.3
8 of the Penal Code, under which section is im-
9 prisonment without possibility of parole.
10 (emphasis added). If it is agreeable with the
11 District Attorney's Office, it is the defendant's
12 desire to enter a plea to count two."

13 California Penal Code § 1192.3 allows a defendant
14 charged with an offense to specify in his plea of guilty the
15 punishment he is to receive. If the plea is accepted by the
16 prosecuting attorney in open court and is approved by the
17 court, the defendant cannot be sentenced to a punishment more
18 severe than that specified in the plea.

19 The Reporter's Transcript further shows that the Court
20 then read count two to the petitioner (RT 3), and proceeded
21 to explain to petitioner the consequence of his plea (RT 4-5)
22 as follows:

23 'THE COURT: . . . Your counsel, the Public
24 Defender here, has stated that you wish to enter
25 a plea of guilty to this count and admit the
26 fact that you were armed with a deadly weapon,
27 as provided in Section 1192.3 of the Penal Code
28 of this State, that you be imprisoned in the
29 State Prison for the term no greater than the
30 remainder of your natural life, without possibil-
31 ity of parole. Is that your understanding of
32 this matter? (emphasis added).

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Is it your wish to enter a plea
3 of guilty to count two as charged in the indictment
4 as I have just read it to you?

5 THE DEFENDANT: Yes.

6 THE COURT: No force or duress has been
7 exerted upon you?

8 THE DEFENDANT: No, sir.

9 THE COURT: And may I ask if there have been
10 any promises. Has any promise been given you
11 with respect to this plea?

12 THE DEFENDANT: No, sir.

13 THE COURT: The plea of guilty to count two
14 of the indictment will be entered with a further
15 provision this plea is made under Section
16 1192.3 of the Penal Code, with the admission the
17 defendant was armed with a deadly weapon."

18 The trial court then proceeded to read each of the
19 other counts of the indictment to petitioner and petitioner
20 pled guilty to each of the counts already above set forth.

21 The Reporter's Transcript further shows that
22 petitioner waived time for sentence (RT 11-12) and that the
23 court then imposed sentence on count two:

24 THE COURT: . . . As to count two of the
25 indictment it will be the judgment and order of
26 the Court that Charles William Dennis be
27 imprisoned in the State Prison for the remainder
28 of his natural life, without possibility of
29 parole."

30 Petitioner's allegation concerning his attorney's
31 assurance of parole eligibility in seven years must be con-
32 sidered in the context of these proceedings.

We can understand that, where (as in Gilmore v.

1 California, 304 F.2d 916, 918-919 (9th Cir. 1966) a petition-
2 er alleges that his attorney had told him that there was a
3 "promise" by the Court, "an agreement" with the District
4 Attorney, and in effect a "deal" for a lenient sentence, the
5 allegation (allowing for lack of skill in pleading), should
6 be regarded as impliedly stating that there was such a deal
7 in which the court and prosecution participated. Here,
8 however, petitioner's allegation concerning what his attorney
9 told him falls far short of stating, implying or suggesting
10 any statement by the attorney that such a deal had been made
11 with the court and/or the prosecuting attorney.

12 Petitioner merely alleges that the attorney explained
13 to him (erroneously) that California did not have life
14 sentence without possibility of parole and that petitioner
15 would be eligible for parole after seven years, coupled
16 with the attorney's further statement to the effect that the
17 judge would, nevertheless, state "life without possibility
18 of parole."

19 There is nothing in this allegation to support the
20 implication that petitioner was being told of any "deal"
21 for life with possibility of parole - only the attorney's
22 erroneous explanation that petitioner would get parole in
23 seven years no matter what the judge on the bench might say.

24 We cannot, therefore, treat petitioner's allegation
25 as intending to state either that there was such a deal or
26 even that the attorney told him there was such a deal.

27 The petition in the pending case falls within the
28 rule, recognized in Gilmore, supra, that mere disappointment
29 at the severity of the sentence received upon a plea of
30 guilty is no ground for habeas corpus "even where defendant's
31 counsel expressed an opinion that leniency will be granted".
32 (emphasis added). See Pinedo v. United States, 347 F.2d

1 142 (9th Cir. 1965); United States v. Parrino, 212 F.2d
2 919 (2d Cir. 1954).

3 Reverting to our previous reference to alleged
4 incompetency of counsel, we do not believe that the mere alle-
5 gation that the attorney erroneously stated the law regarding
6 penalty on conviction of count two alleges incompetency of
7 counsel - especially when read in connection with the
8 transcript of proceedings already cited above, indicating
9 that counsel did in open court correctly set forth the
10 alternative penalty of life without possibility of parole
11 and that defendant indicated his understanding thereof.

12 For the reasons above set forth the Court concludes
13 that petitioner's application for the writ of habeas corpus
14 does not allege facts upon which relief could be granted,
15 and it is therefore ordered as follows:

16 (a) That petitioner's application for the writ of
17 habeas corpus be denied; (b) that the Order to Show Cause
18 heretofore issued herein be discharged; and (c) that these
19 proceedings be dismissed.

20 Dated: October 10th, 1967.

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23 W. T. SWICORD
24 UNITED STATES DISTRICT JUDGE
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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OFFICE OF THE U.S. DISTRICT COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES W. DENNIS,)
Petitioner,)
-vs-) No. 44833
THE PEOPLE OF THE STATE OF) O R D E R
CALIFORNIA and LAWRENCE E.)
WILSON, Warden, California)
State Prison at San Quentin,)
California,)
Respondent.)

Petitioner, Charles W. Dennis, a prisoner at the California State Prison at San Quentin, California, has petitioned this Court for a Writ of Habeas Corpus pursuant to the provisions of 28 U.S.C. § 2241 (1964) after exhausting his state remedies as required by 28 U.S.C. § 2254 (1964).

On March 2, 1966, this Court issued an Order to Show Cause; on March 25, 1966, respondent filed a Return; and on June 3, 1966, petitioner filed a Traverse to the Return.

The record herein shows that on September 28, 1962, in the Superior Court of the State of California in and for the County of Riverside, petitioner was convicted, after entering a plea of guilty, of violating Cal. Penal Code §§ 217 (assault with a deadly weapon with intent to commit murder), 261(3) (forcible rape), 209 (kidnapping with bodily harm) and 211 (robbery of the first degree). Petitioner was sentenced to life imprisonment in the state prison

1 and to the terms prescribed by law as to the other offenses,
2 all sentences to run concurrently.

3 Petitioner challenges his convictions upon several
4 grounds. However, petitioner's basic contentions are that
5 he was coerced into pleading guilty to the offenses charged
6 and that he was not adequately represented by counsel.

7 As background information for what actually happened,
8 petitioner has supplied the following account:

9 "Petitioner was a resident of San Bernardino,
10 California from 1959 until about June of 1960.
11 Petitioner met the alleged victim ... around the
12 middle of March 1960 at a place of entertain-
13 ment called 'Small's Night Club' in San Bernardino.
14 Petitioner and the alleged victim developed an
15 intimate relationship, which later culminated
16 into secret rendezvous. The alleged victim,
17 being married and with family, preferred
18 discretion and exercised precautionary methods
19 to prevent discovery of said meetings. The
20 alleged victim refused to give petitioner her
21 telephone number, but did take the telephone
22 number of the petitioner with a promise to call
23 petitioner shortly after the first meeting.
24 Approximately two weeks later the alleged victim
25 did call petitioner by phone, and a date was set
26 for the next meeting. Petitioner and the alleged
27 victim went to a drive-in theater, and on that
28 date an act of sexual intercourse was consummated,
29 followed by similar in nature thereafter. On or
30 about June 28, 1960, petitioner, following a
31 change of residence from San Bernardino to
Riverside, California, received another call from
the alleged victim, requesting that the petitioner
meet her on the next day, which was June 29, 1960.
Petitioner agreed to meet her. The plan was to
meet in a secluded locality, which required that
both the petitioner and the alleged victim drive
their individual vehicles to the designated place
of rendezvous. The alleged victim parked her car
behind the car of the petitioner and thereafter
joined the petitioner in his car. Several
minutes had passed when a man driving a light
truck appeared on the scene. Upon perceiving the
petitioner, a Negro, and the alleged victim, a
white woman, seated in the car together, the
truck driver, without respect for the privacy of
others, reached into his glove compartment and
withdrew what appeared to be a gun. Petitioner,
without knowledge as to what might transpire,
removed a weapon, which was concealed under the
front seat of his car, and fired at the approach-
ing intruder. Petitioner and the alleged victim
sped away from the scene of the alleged crime
with the petitioner driving his car, unaware of

1 "shot.

2 "After the petitioner and the alleged victim
3 had driven a short ways away, petitioner then
4 let the alleged victim out of his car so she
5 could return to her own vehicle.

6 "Upon returning to the scene of the alleged
7 crime, the alleged victim, with the intention
8 of protecting herself from exposure and
9 perhaps destruction to her family life, gave
10 a different version from what had transpired
11 to the police.

12 "Petitioner was arrested on or about July 5,
13 1960, in the County of Riverside, State of
14 California and taken to the County Jail of said
15 county." Petition for Habeas Corpus, pp. 5, 6.

16 After his arrest, petitioner alleges, in substance
17 and effect, that the following events took place: That on
18 July 9, 1960, he appeared before a magistrate who, after
19 reading the complaint, dismissed the case; that the petitioner
20 left the courtroom, presumably free, and was rearrested in
21 the corridor and returned to jail; that on July 13, 1960,
22 the Riverside County Grand Jury returned an indictment
23 against petitioner charging him with the offenses to which
24 he eventually pleaded guilty; that on July 15, 1960, he was
25 arraigned on these charges and the public defender was
26 appointed to represent him; that on September 24, 1960, the
27 Court committed petitioner to the Patton State Hospital for
28 a determination as to his sanity; that subsequently he escaped
29 from this hospital and was picked up in Florida two years
30 later and returned to Riverside County on or About September
31 22, 1962; that he was arraigned once again on September 24,
1962, and that on September 28, 1962, he withdrew his prior
plea of not guilty and not guilty by reason of insanity to
the charges and entered pleas of guilty thereto. Petitioner
does not make clear in his petition when he entered his
original plea of not guilty and not guilty by reason of
insanity.

Petitioner alleges that at this September 28, 1962

1 court proceeding, Dr. Otto L. Gericke of Patton State
2 Hospital reported to the Court that petitioner was sane and
3 had escaped from the hospital. In addition, petitioner
4 alleges that at this proceeding he waived time for judgment,
5 waived reference to the probation officer and requested
6 immediate sentencing.

7 In support of his contentions that his plea of guilty
8 was coerced and that he was not adequately represented
9 by counsel, petitioner, alleges the following: That follow-
10 ing his arrest in the corridor of the courthouse on July 9,
11 1960, Mr. Deal of the Riverside Public Defender's office
12 came to see him and informed him of the probability of
13 getting sentenced to the gas chamber if he did not plead
14 guilty; that thereafter a doctor visited him and declared
15 him sane to stand trial; that following this doctor's
16 diagnosis, petitioner was subjected to threats and harass-
17 ment by the District Attorney, police and the Public Defender
18 which resulted in a complete mental breakdown of petitioner,
19 whereupon, two doctors were sent to examine petitioner and
20 concluded that petitioner was mentally unbalanced and that
21 he should be committed to Patton State Hospital; that at the
22 hospital petitioner was harassed, interrogated and inti-
23 mated and told by doctors there that he would die in the
24 gas chamber if he persisted in his claim of innocence and
25 as a result thereof he was finally driven to escape from
26 the hospital; that after he was brought back to Riverside
27 County on September 22, 1962, petitioner was represented by
28 a Craig Biddle, the Riverside County Public Defender, who
29 had been in the District Attorney's office at the time of
30 petitioner's arrest in 1960; and that Mr. Biddle advised him
31 that if he fought his case he would get the gas chamber, but
32 that if he pleaded guilty he would get life in prison.

1 for parole in seven years. Under petitioner's present
2 sentence he is never eligible for parole.

3 Petitioner also alleges that his counsel, Mr. Biddle,
4 did not consult with him sufficiently to adequately represent
5 him, to wit: only one time from the date of his return to
6 Riverside, California on September 22, 1962, to the date of
7 his final court appearance on September 28, 1962. Traverse,
8 p. 13.

9 Petitioner further alleges in his petition that at
10 the time of the offense he was an illiterate person without
11 formal education and was ignorant of the law and its proced-
12 ures, and that no one took time to explain things to him.

13 Finally, petitioner alleges that at no time during the
14 proceedings was he warned or informed of his constitutional
15 rights to remain silent, to have the assistance of counsel
16 at all stages of the proceedings, etc.

17 From the foregoing it is the opinion of the Court
18 that petitioner should supply the Court with additional facts
19 before the Court decides if an evidentiary hearing is required.
20 Most of petitioner's application is devoted to legal argument
21 and to charges of "threats", "coercion" and "harrassment"
22 by the authorities as well as a recitation of events prior
23 to his arrest. This is not the purpose of habeas corpus.
24 Petitioner must give the specific facts of "Who", "When"
25 and "Where" in support of his alleged conclusions that he was
26 coerced into pleading guilty and was not adequately repre-
27 sented by counsel. See Schletta v. California, 284 F.2d
28 827, 834 (9th Cir. 1960).

29 In his petition, petitioner does not make clear if
30 he made any incriminating statements to the police, doctors
31 or other authorities. All petitioner states is that he

1 referring to his plea of guilty as the confession or whether
2 he made a confession prior to plea.

3 Accordingly, the Court will grant petitioner forty-
4 five (45) days from the date of this Interim Order to file
5 a Supplement. In this Supplement, petitioner should give
6 a day by day account of what transpired from September 22,
7 1962 to September 28, 1962, giving approximate times, persons
8 and places as to all events which support petitioner's
9 contentions that he was coerced into pleading guilty and
10 that he was not adequately represented by counsel. In
11 addition, petitioner should give as best he can remember the
12 gist of all conversations he had with various persons which
13 would support these contentions.

14 With respect to the period of July 5, 1960, to the
15 time of his escape, petitioner should likewise report the
16 same information if it had a bearing on his September 28,
17 1962, plea of guilty. For example, if petitioner during
18 this time made any oral or written incriminating statements
19 to the police or others, he should give the circumstances
20 surrounding the making of such statements (i.e., what
21 caused him to make the statements), what the statements
22 consisted of and other particulars, such as the approximate
23 time of the statement, place and who was present. If
24 petitioner cannot remember certain events or facts, he
25 should so state.

26 Furthermore, in order to aid the Court in deciding the
27 necessity of an evidentiary hearing, respondent is requested
28 to supply the Court within forty-five (45) days of this
29 Interim Order the following information: (1) a transcript
30 of all judicial proceedings concerning petitioner from
31 the date of his arrest on July 5, 1960, to his final court
32 appearance on September 28, 1962, and (2) all medical reports

1 submitted to the Riverside Superior Court or in the possession
2 ion of the prosecuting authorities which would show the
3 mental condition of petitioner from the date of arrest on
4 July 5, 1960, until September 28, 1962.

5 IT IS THE ORDER of this Court that petitioner and
6 respondent have forty-five days from the date of this Interim
7 Order to provide the above requested information.

8 Dated: December 16th, 1966.
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11 W. T. SWEIGERT
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UNITED STATES DISTRICT JUDGE
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

-vs-

CHARLES WILLIAM DENNIS,

Defendant.

COPY

NO: CR 1678

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Before the Honorable John G. Gabbert,
Judge, of the Superior Court, Department
II, on

SEPTEMBER 28, 1962

APPEARANCES:

FOR THE PEOPLE:

WILLIAM O. MACKAY, DISTRICT ATTORNEY
BY: Roland Wilson, Chief Trial Deputy
Superior Courthouse, Riverside, California

FOR THE DEFENDANT:

W. CRAIG BIDDLE, PUBLIC DEFENDER
Superior Courthouse, Riverside, California

THOMAS J. NOLAN, CSR
RIVERSIDE, CALIFORNIA

1 SEPTEMBER 28, 1962 - PEOPLE VERSUS DENNIS

2
3 THE COURT: The matter of People versus
4 Charles William Dennis.

5 MR. BIDDLE: This matter was regularly
6 continued to this time for the setting of a trial date. I
7 wish to advise the Court at the outset, I have advised the
8 Defendant, Mr. Dennis, that at the time of the commission of
9 the offense, that is when this case arose, when the indictment
10 was filed in July of 1960, that I did, at that time, serve
11 as a Deputy in the District Attorney's Office, but was not
12 connected with the case; but I was serving in the District
13 Attorney's Office.

14 Mr. Dennis is now aware of that fact and it is my
15 understanding, even though this fact has been revealed to him,
16 he is willing to allow me to serve as Public Defender.
17 Possibly the Court could inquire.

18 THE COURT: I will ask you if you have
19 been so advised.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you consent that Mr.
22 Biddle, the Public Defender, represent you in this proceedings?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: It is your understanding
25 that Mr. Biddle, at the time this matter was brought before
26 the Court in July of 1960, he was a Deputy in the Office of

1 the District Attorney?

2 THE DEFENDANT: Yes.

3 THE COURT: And has since been
4 appointed Public Defender and you are agreeable he represent
5 you?

6 THE DEFENDANT: Yes.

7 MR. BIDDLE: Your Honor, previously
8 a plea of not guilty and not guilty by reason of insanity was
9 entered and, at this time, we would ask the Court for
10 permission to withdraw the plea for the purpose of entering
11 a new and different plea.

12 THE COURT: Is that your desire, Mr.
13 Dennis? The indictment here sets forth four different counts.
14 At the time of your appearance before Judge Waite in 1960, you
15 entered a plea of not guilty and not guilty by reason of
16 insanity to these four counts.

17 THE DEFENDANT: That's right.

18 THE COURT: Is it your desire to
19 withdraw your plea of not guilty and not guilty by reason of
20 insanity to each of these four counts, at this time?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: With respect to count one,
23 have you discussed these with the Defendant?

24 MR. BIDDLE: Yes, I have.

25 THE COURT: Do you wish me to take up
26 each count?

1 MR. BIDDLE: Count two, Your Honor,
2 with respect to count two, it is the Defendant's desire to
3 enter a plea pursuant to Section 1192.3 of the Penal Code,
4 under which section is imprisonment without possibility of
5 parole. If it is agreeable with the District Attorney's
6 Office, it is the Defendant's desire to enter a plea to count
7 two.

8 MR. WILSON: With respect to count two,
9 there is the allegation of being armed. Is it the Defendant's
10 desire to admit that he was armed with a deadly weapon?

11 MR. BIDDLE: Yes, the Defendant does
12 admit he was armed with a deadly weapon at the time of the
13 commission of the offense.

14 MR. WILSON: The People will recommend
15 that the Court accept the plea to count two.

16 THE COURT: Mr. Dennis, I'm going to
17 read to you count two which counsel has just mentioned. This
18 count reads as follows:

19 "For a further and separate cause of action, being
20 a different offense of the same class of crimes, and
21 offenses, as the charge set forth in each of the
22 other accounts hereof, the said Charles William Dennis
23 is accused by the Grand Jury of Riverside County and
24 State of California, by this indictment, of the crime
25 of violation of Section 209 of the Penal Code,
26 kidnapping, a felony, committed as follows: The said

1 Charles William Dennis, on or about June 29, 1960,
2 in the County of Riverside, State of California, did
3 wilfully and unlawfully kidnap and carry away
4 Marguerite Mulling Anderson for the purpose of
5 committing robbery and, while in the commission of
6 said offense, did inflict bodily harm upon the said
7 Marguerite Mulling Anderson; that at the time of the
8 commission of the offense charged in this count, the
9 Defendant was armed with a deadly weapon, to wit:
10 a .22 calibre revolver."

11 Your counsel, the Public Defender here, has stated
12 that you wish to enter a plea of guilty to this count and
13 admit the fact that you were armed with a deadly weapon, as
14 provided in Section 1192.3 of the Penal Code of this State,
15 that you be imprisoned in the State Prison for the term no
16 greater than the remainder of your natural life, without
17 possibility of parole. Is that your understanding of this
18 matter?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Is it your wish to enter a
21 plea of guilty to count two as charged in the indictment as I
22 have just read it to you?

23 THE DEFENDANT: Yes.

24 THE COURT: No force or duress has been
25 exerted upon you?

26 THE DEFENDANT: No, sir.

1 THE COURT: And may I ask if there
2 have been any promises.

3 Has any promise been given you with respect to this
4 plea?

5 THE DEFENDANT: No, sir.

6 THE COURT: The plea of guilty to count
7 two of the indictment will be entered with a further provision
8 this plea is made under Section 1192.3 of the Penal Code, with
9 the admission the Defendant was armed with a deadly weapon.

10 MR. WILSON: May we have the Defendant
11 admit, personally, the possession of a deadly weapon?

12 THE COURT: Yes. Mr. Dennis, do you
13 admit at the time of the commission of the offense, with
14 respect to count two involving Marguerite Mulling Anderson,
15 you were armed with a deadly weapon, a .22 calibre revolver?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: With respect to the
18 remaining count three of the indictment and count one --

19 MR. BIDDLE: To count one, it is the
20 Defendant's desire to enter a plea of guilty.

21 THE COURT: Count one, Mr. Dennis, reads
22 as follows:

23 "Charles William Dennis is accused by the Grand
24 Jury of Riverside County and State of California, by
25 this indictment, of the crime of violation of Section
26 217 of the Penal Code (assault with a deadly weapon

1 with the intent to commit murder), a felony,
2 committed as follows: The said Charles William
3 Dennis, on or about June 29, 1960, in the County of
4 Riverside, State of California, did wilfully and
5 unlawfully assault Leonard Carl Lipskey with a
6 deadly weapon, with the intent to commit murder."

7 What is your plea to that count?

8 THE DEFENDANT: Guilty.

9 THE COURT: Have any promises been made
10 to you with respect to your plea with respect to count one?

11 THE DEFENDANT: No, sir.

12 THE COURT: A plea of guilty will be
13 entered as to count one of the indictment. We will take up
14 count three.

15 THE COURT: Is the Defendant's desire
16 also under count three to enter a plea of guilty?

17 Count three, I will also read to you, Mr. Dennis,

18 "For a further and separate cause of action, being a
19 different offense of the same class of crimes and
20 offenses as the charge set forth in each of the other
21 counts hereof, the said Charles William Dennis is
22 accused by the Grand Jury of the County of Riverside,
23 and State of California, by this indictment, of the
24 crime of violation of Section 211 of the Penal Code
25 (robbery), a felony, committed as follows: The said
26 Charles William Dennis, on or about June 29, 1960, in

1 the County of Riverside, State of California, did
2 wilfully and unlawfully rob Marguerite Mulling Anderson
3 of lawful money of the United States; that at the time
4 of the commission of the offense charged in this count,
5 the Defendant was armed with a deadly weapon, to wit:
6 a .22 calibre revolver."

7 Do you understand that count?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Have any promises been made
10 to you with respect to your plea to count three?

11 THE DEFENDANT: No, sir.

12 THE COURT: What is your plea to count
13 three as I have read it to you?

14 THE DEFENDANT: Guilty.

15 THE COURT: The plea of guilty will be
16 entered as to count three. Do you admit, further, that at the
17 time of this offense you were armed with a deadly weapon, to
18 wit, a .22 calibre revolver?

19 THE DEFENDANT: Yes, sir.

20 MR. WILSON: At this time, in view of
21 his admission of his being armed with a deadly weapon, the
22 Court should fix the degree as first degree.

23 THE COURT: The Court will fix the
24 degree as set forth in count three as admitted by the Defendant
25 as robbery in the first degree. As to count four.

26 MR. BIDDLE: It is the Defendant's

1 desire to enter a plea of guilty.

2 THE COURT: Count four is a further and
3 separate cause of action, and I will read it to you, Mr. Dennis.

4 "For a further and separate cause of action, being
5 a different offense of the same class of crimes and
6 offenses as the charge set forth in each of the other
7 counts hereof, the said Charles William Dennis is
8 accused by the Grand Jury of Riverside County and
9 State of California, by this indictment, of the crime
10 of violation of Section 261, subdivision 3, of the
11 Penal Code (forceable rape), a felony, committed as
12 follows: The said Charles William Dennis, on or
13 about June 29, 1960, in the County of Riverside,
14 State of California, did wilfully and unlawfully
15 accomplish an act of sexual intercourse with
16 Marguerite Mulling Anderson, a female who was not
17 then and there the wife of the said Charles William
18 Dennis, by force and violence against the will and
19 without the consent of said Marguerite Mulling
20 Anderson; that at the commission of the offense
21 charged in this count, the Defendant was armed with
22 a deadly weapon, to wit: a .22 calibre revolver."

23 You understand the nature of the charge set forth in
24 count four?

25 THE DEFENDANT: That's right.

26 THE COURT: Have any promises been given

1 to you with respect to your plea as to count four?

2 THE DEFENDANT: No, sir.

3 THE COURT: Having in mind the count
4 which I have read to you, count four, what is your plea to that
5 count?

6 THE DEFENDANT: Guilty.

7 THE COURT: The plea of guilty will be
8 entered as to count four.

9 MR. WILSON: An admission of being
10 armed?

11 THE COURT: Do you also admit at the
12 time of the commission of the offense alleged in count four
13 that you were armed with a deadly weapon, a .22 calibre
14 revolver?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: The Defendant is ready for
17 sentence?

18 MR. BIDDLE: Yes, Your Honor.

19 THE COURT: Will you waive time for
20 sentence?

21 MR. BIDDLE: We will waive time.

22 THE COURT: Your counsel has indicated
23 that you will waive time. Because of the circumstances which
24 exist, are you willing to waive time for the imposition of
25 sentence? The Court otherwise would have to continue this
26 matter for the purpose of pronouncing judgment. Are you willing

1 to waive such a continuance and consent that the Court may
2 impose sentence on the charges set forth, to which you have
3 heretofore entered a plea of guilty?

4 THE DEFENDANT: Yes.

5 MR. WILSON: Do you desire me to arraign
6 him for judgment?

7 THE COURT: Yes, would you please?

8 MR. WILSON: Mr. Charles William Dennis,
9 it is my duty to advise you that on July 28, 1960, an
10 indictment was filed in the Riverside Superior Court, charging
11 you with a violation of Section 217 in count one and Section
12 209 in count two, and Section 211 in count three and Section
13 261.3 in count four. In counts two, three and four, there is
14 an additional charge you were armed with a deadly weapon.

15 On July 15, 1960, you were arraigned in the Superior
16 Court of the County of Riverside and stated your true name was
17 Charles William Dennis. At that time, the Superior Court
18 appointed the Public Defender to represent you, and the time
19 for plea was continued to July 26, 1960.

20 On July 26, 1960, you entered a plea in the Superior
21 Court of not guilty and not guilty by reason of insanity to
22 each of the four counts in the indictment. The trial was set
23 for October 17, 1960, at 10:00 o'clock a. m. in the Superior
24 Court. Doctors were appointed to examine you and on
25 September 21, 1960, pursuant to the reports of the doctors, the
26 Court committed you to Patton State Hospital under Section 1368

1 of the Penal Code. On September 12, 1962, a Bench Warrant
2 was issued, based on the affidavit of Dr. O. L. Gericke,
3 Superintendent of Patton State Hospital, and upon your arrest,
4 you were held without bail and on September 24, 1962, you
5 were here in the Superior Court on the Bench Warrant which
6 was issued on September 12, 1962, and at that time, the Public
7 Defender was reappointed to represent you in the matter and
8 it was set for September 28, 1962, at 11:00 a. m., Department
9 II, for further proceedings and, on this date, September 28,
10 1962 you entered pleas of guilty to counts one, two, three and
11 four of the indictment and in counts two and three and four,
12 you admitted you were armed with a deadly weapon. You have
13 now waived time for the matter to be continued for further
14 proceedings and I will ask you if you have any legal cause to
15 show why judgment should not now be pronounced.

16 THE DEFENDANT: No, sir.

17 THE COURT: Is there any legal cause
18 to show why judgment should not be pronounced at this time?

19 MR. BIDDLE: No, Your Honor.

20 THE COURT: In the matter of Charles
21 William Dennis, as to counts one, three and four of the
22 indictment, it will be the judgment and order of the Court
23 that the Defendant, Charles William Dennis, be sentenced to
24 the State Prison for the term prescribed by law.

25 As to count two of the indictment, it will be the
26 judgment and order of the Court that Charles William Dennis

1 be imprisoned in the State Prison for the remainder of his
2 natural life, without possibility of parole.

3 The Sheriff of this County is ordered and directed
4 to transport the Defendant to the Director of Corrections at
5 the California Institute for Men at Chino, California to
6 carry out this sentence.

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2 STATE OF CALIFORNIA)
3) ss.
4 COUNTY OF RIVERSIDE)

5 I, THOMAS J. NOLAN, a certified shorthand reporter,
6 do hereby certify:

7
8 That on September 28, 1962, I took in shorthand a true
9 and correct report of the testimony given and proceedings had
10 in the above-entitled cause; and that the foregoing is a true
11 and correct transcription of my shorthand notes taken as
12 aforesaid, and is the whole thereof.

13
14 Dated: Riverside, California _____, 19____
15
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17 _____
18 Thomas J. Nolan, CSR
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF APPELLANT ECONO-CAR INTERNATIONAL, INC.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER
500 Electric Building
P. O. Box 2529
Billings, Montana 59101

FILED

Filed _____, 1968

APR 1 1968

_____, Clerk

WM R. LUCK, CLERK

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II. STATEMENT OF JURISDICTION

Jurisdiction of the district court is based upon 28 U.S.C.A. § 1332. The complaint (R. 6)* alleges that defendant Econo-Car International, Inc. is a New Jersey corporation and demands judgment in the sum of \$70,179.86. Defendant's petition for removal (R. 2) alleges that plaintiff is a citizen and resident of the State of Montana and that defendant Econo-Car International, Inc. is a New Jersey corporation with its principal headquarters and place of business at Union, New Jersey. The matter in controversy exceeds \$10,000.00 and is between citizens of different states. Jurisdiction has not been disputed.

The district court denied defendant's motion for partial summary judgment and ruled on defendant's motion for protective orders in its order dated August 7, 1967, (R. 35). The case was tried to a jury. Judgment was entered in favor of the plaintiff in the sum of \$7,052.00 on August 16, 1967, (R. 82). An order was entered denying plaintiff's motion for new trial and denying defendant's motions for judgment notwithstanding the verdict and for a new trial on September 20, 1967, (R. 87). Defendant filed its notice of appeal on October 18, 1967, (R. 88). Plaintiff filed its notice of appeal on October 24, 1967, (R. 89).

Defendant filed designation of parts of record and

* The original papers volume of the record on appeal will be cited as follows: (R.____). The reporter's transcript of the trial proceedings will be cited as follows: (Tr.V.____, p.____).

statement of issues on October 27, 1967, (R. 90). Plaintiff filed designation of record on appeal on November 13, 1967, (R. 92). The appeal was docketed on January 18, 1968. Jurisdiction of this court is invoked under Title 28, U.S.C.A. § 1291.

III. STATEMENT OF THE CASE

In the spring of 1963 plaintiff Carl Taute, while employed in a management capacity for a wholesale grocery company in Billings, Montana, responded to an advertisement in the business opportunity section of the Billings Gazette. As a result, contact was established between plaintiff and defendant Econo-Car International, Inc. franchise salesman, Mr. Burko and Mr. Alvarez. (Tr.V.I, p.26).

At their second meeting held on or about June 28, 1963, plaintiff signed an agreement (Pltf.'s Exh. 6 (a photocopy is Appendix "A" hereto)) to become defendant's local franchisee in Billings, Montana, for the operation of an Econo-Car rental business. Plaintiff and his wife were allowed to testify over defendant's objections that prior to their signing the agreement Burko made certain false representations to them, which will be set forth in more detail below. Many of the questions raised on this appeal revolve around whether testimony of these representations was properly admissible. At the time of the execution of franchise agreement by Taute he paid to Mr. Burko the franchise fee in the sum of \$6,000.00 (Tr.V.I, p.68). A few days later Taute paid to Burko an additional sum of \$2,345.00 which included a security deposit on 10 automobiles of \$1,000.00 and the first month's rental of 10

vehicles in the sum of \$1,345.00 (Tr.V.I, p.69).

Plaintiff attended a seminar in Elizabeth, New Jersey for new Econo-Car franchisees held on August 16 and 17, 1963 (Tr.V.II, p.126). He stated that it was a well organized program designed to teach novices how to run a car rental operation and that "it took two days and we worked" (Tr.V.I, pp.46-47). On the second day of the seminar, August 17, 1963, plaintiff learned that those alleged misrepresentations made to him by Mr. Burko on June 28, 1963, which he was allowed to testify about at the trial, were all false (Tr.V.II, pp.127-128). Thereafter, on or about October 15, 1963, plaintiff terminated his employment at Ryan Grocery Company (Tr.V.II, p. 130). On October 23, 1963, Taute took delivery of his automobiles (Tr.V.II, pp.129-130) and he had his grand opening of Econo-Car of Billings on October 24 or 25, 1963 (Tr.V.II, p. 129).

Carl Taute operated an Econo-Car rental business in Billings from the time of his grand opening in October 1963 until February 15, 1965, or for a period of about 16 months (Tr.V.II, p.130). He mailed his notice of termination (Pltf.'s Exh. 21) under the terms of the contract to Econo-Car International, Inc. on November 14, 1964. (Tr.V.II, p.130).

Plaintiff filed this action on March 25, 1965, seeking damages in the sum of \$70,179.86 (R. 6). By the first claim of plaintiff's complaint he sought damages for alleged breaches of contract and by the second claim he sought damages for fraud in the inducement of the contract based upon Burko's allegedly false misrepresentations. Defendant by its answer

and amended answer (R. 16, 30) denied any breach of contract or fraud and asserted that plaintiff waived any right that he may have had to recover damages for fraud, that he accepted and ratified any changes in the contract, and that he was guilty of laches and estopped from claiming damages by reason of his proceeding with the contract after early learning of the falsity of their alleged misrepresentations.

Defendant filed a motion for summary judgment as to plaintiff's claim for damages for fraud and a motion to exclude testimony as to any representations made by Burko prior to the execution of the contract which would tend to add to, vary, contradict or alter the terms of the written contract. (R. 32). The court denied the motion for partial summary judgment and granted in part and denied in part defendant's motions for exclusion of testimony regarding Burko's alleged misrepresentations (R. 35).

After a trial before the court with a jury, the jury brought in a verdict for the plaintiff in the sum of \$1,052.00 on plaintiff's first claim and for the sum of \$6,000.00 on plaintiff's second claim, and judgment was entered thereon. (R. 80-81). Defendant filed a motion for judgment notwithstanding the verdict (R. 83) and both parties filed a motion for new trial (R. 83, 85), all of which motions were denied (R. 87). Both parties filed notices of appeal from the judgment of the district court (R. 88, 89).

The first question raised by defendant relating to plaintiff's claim for fraud is: Was evidence of statements allegedly made by Burko to plaintiff prior to the execution

of the written agreement inadmissible because such statements were oral representations relating directly to the subject matter of a contract and tended to alter or add to the stipulations of written contract?

The full substance of the testimony concerning Burko's statement is as follows:

- (a) That he had had a survey of Billings conducted and that as a result Econo-Car International, Inc. knew the top three locations in Billings for a car rental business (Tr.V.I, pp.37-39; Tr.V.II, pp.229, 230, 233).
- (b) That defendant would send a three man crew to Billings who knew the top three locations, who would call on logical prospects for car rental business, develop substations and generally assist overall in the first few weeks of the business (Tr.V.I, p.40; Tr.V.II, p.230).
- (c) That every cent of the \$6,000.00 franchise fee would be spent in getting the operation going (Tr.V.I, pp.41,42; Tr.V.II, p.243), and that there would be three full pages of newspaper ads in our local paper in connection with the grand opening (Tr.V.I, p.40; Tr.V.II, p.234).
- (d) That plaintiff had the option of deciding the term of the lease between 12 and 18 months as an explanation of paragraph 2 of Schedule B to plaintiff's Exhibit No. 6 (Tr.V.I, p.44; Tr. V.II, p.235).

Each of these elements of extrinsic negotiation were dealt with in the franchise agreement (Pltf.'s Exh. 6 and App. "A" hereto) as follows:

Item: Selection of premises and guidance in setting up operations and sales promotion.

Provisions in Contract (Paragraph 4.C.)

"4. ECONO-CAR AGREES:

* * *

"C. To furnish guidance to the ECONO-DEALER in establishing, operating, and promoting the business of renting automobiles, with respect to:

- a) The selection of premises for the establishment of places of business.
- b) The institution and maintenance of effective and proven office management systems and business operations procedures.
- c) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the Basic ECONO-DEALER's kit, as and when such aids are developed by ECONO-CAR's staff."

Item: Field representatives.

Provision in Contract (Paragraph 1 of Schedule "A")

"The following items are included in the new ECONO-DEALER's Set-Up Kit:

"1. The ECONO-CAR OPERATIONS AND PROCEDURES MANUAL is the ECONO-DEALER's best friend. All facets of the ECONO-DEALER's operation are discussed in depth. All new ECONO-DEALERS are invited to attend THE ECONO-CAR TRAINING SCHOOL in Elizabeth, New Jersey. Here the ECONO-DEALER is taught the Auto Rental Business including the use of all forms and systems. The Operations and Procedures Manual serves as a constant reminder of the things learned at the TRAINING SCHOOL. Specially trained field representatives provide additional on the spot training and help."

Item: Local newspaper advertising.

Provision in Contract (Paragraphs 5 and 6 of Schedule "A")

"5. ANNOUNCEMENT ADVERTISING: ECONO-CAR places and runs at its own expense ads in the new ECONO-DEALER's newspaper to prepare the area for the new ECONO-DEALER.

"6. PUBLICITY: Publicity releases are made to the ECONO-DEALER's newspaper of the new ECONO-DEALERSHIP."

Item: Term of lease of rental automobiles.

Provision in Contract (Paragraph 2 of Schedule "B")

" * * * Each lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. * * *"

Plaintiff's complaints as to the matters referred to in the alleged misrepresentations do not include complaints that the contract as written was breached, but only that the promises made by Burko which expanded upon and added to the written provisions were breached.

A second question presented as to the claim for fraud is whether plaintiff waived any right that he may have had to sue for damages for fraud as a matter of law.

Plaintiff knew or discovered on August 17, 1963, or shortly thereafter, that the statements he asserts were made by Burko were false. (Tr.V.II, pp.127-128, 111-112, 129, 238-240; Tr.V.I, pp. 71-76). As set forth above, plaintiff at that time had not yet quit his job, taken delivery of any automobiles, or commenced operations. He had paid the franchise fee, a deposit and the first month's rental on 10 cars.

On or prior to August 18, 1963, plaintiff signed an

agreement to lease vehicles (Pltf.'s Exh. 7) which provided in paragraph 2 that the term of the lease was 18 months subject to defendant's right to terminate the lease at any time following the first 12 months. (Tr.V.I, p.47). This was contrary to what plaintiff said Burko said was meant by the 12 to 18 month provision of the contract.

Carl Taute on September 14, 1963, in a letter to Mr. Paul McPeake of Econo-Car International, Inc. (Dfdt.'s Exh. 23) outlined in detail the advantages and disadvantages of three prospective locations that Mr. Taute had selected for his Econo-Car dealership in Billings, and then stated in the last paragraph thereof:

"Paul, know I'm asking a lot--but--would you study this and call me with your recommendation. I'm not trying to put you on the spot--but I would like to draw on your experience--and--should mileage rate on my Plymouths be 10¢?"

Carl Taute stated in his termination letter dated November 14, 1964, (Pltf.'s Exh. 21) that the "only criticism I have to offer is toward myself--simply bit off more than I could chew."

On December 3, 1964, subsequent to the date that he mailed his termination letter to defendant, Carl Taute offered by letter (Dfdt.'s Exh. 24) to continue in business as the Econo-Car dealer in Billings if defendant would provide the performance bond necessary for renting space at the municipal airport in Billings (Tr.V.II, p.133).

Carl Taute and Econo-Car exchanged considerable correspondence between the execution of the franchise agreement and up to two months after plaintiff's grand opening

without any mention being made of Burko's representations or complaint that they had not been fulfilled (Dfddt.'s Exhs. 23, 35, 36, 37 & 46).

Another issue raised here as to plaintiff's claim for fraud is whether plaintiff pled and proved all necessary elements of fraud and whether the jury was properly instructed on fraud.

The second claim of the complaint alleges that certain representations were made by Burko, that they were false, that the defendant knew them to be false, that they were made for the purpose of inducing plaintiff to enter into the agreement, and that plaintiff entered into the contract "by and through" the representations of Burko, and that plaintiff was damaged. Plaintiff's pre-trial memorandum (R. 18) adds no new elements except that at one point the representations are referred to as being "material".

The only testimony in the record relating to plaintiff's reliance upon Burko's representations is Carl Taute's testimony that he relied upon Burko's statement that he knew the three top locations in town (Tr.V.I, p.33). There is no testimony that Carl Taute had a right to rely on the statements and no other testimony that he did so rely on any of the representations. Certain of Burko's alleged statements were in the nature of promises. There is no testimony that these promises were made with the intention that they would not be performed.

Another question raised relative to the fraud claim is whether the jury was properly instructed on the elements of fraud and the damages which could be allowed if fraud were

proved.

The court instructed the jury as follows:

"Now, before Mr. Taute may recover on his second cause of action, that is the fraud cause of action, he must prove the following:

1. That Burko made false representations;
2. That Burko knew those statements to be false, and if the statements were promises of what defendant would do in the future, that they were made without any intention of performing them;
3. That Mr. Taute relied on these statements; and,
4. That he was damaged.

"Now, in connection with damage, if you find that all of the foregoing is true; that is, that defendant has proved these items by a preponderance of the evidence, then the measure of damages here is \$6,000.00. Diminished, however, by the amount that you find this franchise was worth on August 17, 1963." (Tr.V.III, pp.281-282.)

Another question raised as to the fraud claim is whether it was error for the court to allow plaintiff to testify that every cent of the franchise fee would be spent in getting the operation going, where this had not been pleaded or mentioned in any pre-trial proceedings; plaintiff testified over objection that Burko stated to him that "we spend every cent of that \$6,000.00 franchise fee in getting the operation going . . ." (Tr.V.I, p.42). No mention had been made by plaintiff as to what use was to be made of the franchise fee in the complaint (R. 6) or plaintiff's pre-trial memorandum (R. 18).

The terms and conditions under which vehicles were made available by Econo-Car International, Inc. to Carl Taute and modifications therein made during the period of the operations raise two issues in this case, (1) whether any such changes constituted breaches of the agreement itself and (2)

Carl Taute ratified and confirmed the contract and thereby waived his rights, if any, to claim damages for the alleged fraud in the inducement of the contract.

The franchise contemplated change in the arrangements for the availability of automobiles, by providing in part as follows:

"4. ECONO-CAR AGREES: . . .

- D. To make available to the ECONO-DEALER at all times a quantity of automobiles for use in the daily rent-a-car business on the most favorable terms available. These vehicles may be made available to the ECONO-DEALER on the basis of sale, lease, or whatever other method or methods that ECONO-CAR shall negotiate in behalf of all of its ECONO-DEALERS. . . .

"5. THE ECONO-DEALER AGREES: . . .

- C. . . . all vehicles must be acquired by the ECONO-DEALER on the basis described in Schedule "B", or upon such other basis as may be presented by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM.

. . .

- E. To operate the ECONO-DEALER's business in accordance with sound business principles, while adhering to the standards set in the ECONO-DEALER's manual, and to any modifications or changes which may be promulgated from time to time by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM and each of its ECONO-DEALERS." (Emphasis supplied).

(Pltf.'s Exh. 6).

Schedule "B" to plaintiff's exhibit 6 provides that each lease thereunder "shall run for a minimum period of 12 months to a maximum of 18 months", but on August 17, 1963, prior to the commencement of any operations, Carl Taute signed plaintiff's exhibit 7 which provided that for the automobiles thereunder the term would be "for a period of 18 months from the date of delivery . . . except that lessor (defendant) shall have the

absolute right, in its sole discretion, to terminate the lease at any time following the 12th month" and then goes on to provide that in the event of early termination that defendant would have to make available replacement vehicles under the same terms and conditions (Para. 2, pltf.'s exh. 7).

In November of 1963 defendant notified plaintiff Carl Taute that there would be a rate reduction with respect to the 1964 automobiles, that the lease term would be changed and that there would be an upgrading of the available automobiles (Pltf.'s Exh. 9; Tr.V.I, p.53, V.II, p.105). Plaintiff paid \$129.00 for his 2 door Valiants for the first month as provided in Schedule "B" to the franchise agreement, but the rate change reduced this sum to \$118.00 for the following months. With respect to the lease term the rate revision notice stated:

"All 1964 automobiles will be available on 12-month leasing terms (instead of the previous 18). Either party may, however, extend the term for up to two months. This shorter lease term will mean great savings to you in maintenance and service costs that usually occur between the 13th and 18th months of operation." (Pltf.'s Exh. 9).

In February of 1964, defendant announced a new six-month leasing program to enable Econo dealers to increase their fleet during the busy months. (Dfdt.'s Exh. 39). Plaintiff responded to this proposed program by stating that he was delighted (Pltf.'s Exh. 39).

In August of 1964, in response to an inquiry from plaintiff, Mr. Paul McPeake of Econo-Car International, Inc. advised Carl Taute that if he wanted an extension on the lease to January 2, 1965, he should write in and request it although

Mr. McPeake didn't "know whether Chrysler will go along".

On or about October 5, 1964, Econo-Car International, Inc. announced the leasing program planned for 1965. (Pltf.'s Exh. 10). This leasing program was to be for a 6-months lease term, with the Econo-Car dealer having the option to extend it up to one full year, and Chrysler Leasing Corporation having the option to extend it by one month. The Econo-Car circular dated December 1, 1964, set forth these amendments in more detail (Pltf.'s Exh. 16). Plaintiff took delivery of 7 1965 cars in the fall of 1964, and then terminated his franchise agreement as of February 15, 1965, at which time the cars were turned in.

Another area of controversy is whether there was a breach of the franchise agreement with respect to the insurance provided, and if so, what damages resulted. The franchise agreement (Pltf.'s Exh. 6) provided that defendant was "to provide the Econo dealer, at no additional expense, with standard type automobile insurance" providing for, among other things, collision insurance with no more than \$100.00 deductible (Para. 4.E. of Pltf.'s Exh. 6). A similar provision appears in the lease form dated July 10, 1963, executed by Carl Taute at Elizabeth, New Jersey, on or before August 17, 1963 (Pltf.'s Exh. 7, para. 6).

Plaintiff made one monthly payment to defendant for each car. This payment included an unsegregated lump sum for the rental payment as well as the amount attributable to insurance. As of January 1, 1964, the defendant put into effect a premium increase of \$5.00 per month per car because of increased

premium costs to it (Pltf.'s Exh. 13). Thus, on a 2 door Valiant plaintiff initially had to pay \$129.00 per month which sum included insurance coverage. Following the rate reduction put into effect on December 1, 1963, this sum dropped to \$118.00, but went back up to \$123.00 as of January 1, 1964, as a result of the insurance premium rate increase (Tr.V.I, pp.63-64; V. II, p.138-139).

In August and September, 1964, Econo-Car International, Inc. notified its dealers, including Carl Taute, that increased insurance premiums forced it to make a choice between increasing its insurance premiums by \$8.00 per car per month or going to \$250.00 deductible from \$100.00 deductible collision insurance coverage. The company elected to go to \$250.00 deductible insurance coverage in line with their competitors in the car rental business. (See Pltf.'s Exh. 13 and 14). On September 1, 1964, Carl Taute wrote to Econo-Car International, Inc. asking if he had a choice between paying the additional \$8.00 per month to retain the prior coverage, or whether it was mandatory that he go to the \$250.00 deductible collision coverage. In a letter dated September 18, 1964, Mr. Paul V. McPeake of Econo-Car International, Inc. informed him that he had no choice (Pltf.'s Exh. 14). Mr. Taute testified in response to the question whether he objected to the company's procedure that he asked for an option so that he could take his choice, and that he didn't know at the time what he would have wanted to do (Tr.V.II, pp.140, 141).

Carl Taute had testified on his deposition that he actually had no actual loss by reason of the insurance coverage

change, that is, that he had had no collision damage to any vehicle during that period exceeding \$100. However, at trial, he checked his records again and testified that in fact he had paid a repair bill for a collision subsequent to the time of the deductible coverage change. However, he did not verify the exact amount of the bill and could not testify to the amount that his bill actually exceeded the \$100.00 (Tr.V.II, pp. 153 through 155).

Carl Taute testified that he knew that Econo-Car International, Inc. was a fast growing company, that it was only about two years old, and that he did anticipate that there might be changes of a certain type in the operations (Tr.V.II, pp.187-188).

At the time of the increase in the insurance rate by \$5.00 on January 1, 1964, Econo-Car instituted a system of 5% cash discount if bills were paid by the 5th of the month. This system was in effect for three months and then was withdrawn to revert to the original agreement (Tr.V.II, pp.106-107). Carl Taute requested and was granted an advance for a number of his lease payments. Econo-Car International, Inc. gave him the 5% discount on payments made with the money loaned to him by Econo-Car International, Inc. (See Tr.V.II, p.199).

QUESTIONS PRESENTED

- 1) Whether Burko's alleged misrepresentations relating to the subject of the contract made prior to the execution of the contract were admissible.
- 2) Whether plaintiff waived any right that he may have had to sue for damages for deceit or fraud by his proceeding under the contract as written after his discovery of the falsity of Burko's alleged misrepresentations at a time when the contract was largely executory.
- 3) Whether plaintiff pleaded and proved all necessary elements of fraud.
- 4) Whether the jury was properly instructed on the elements of fraud.
- 5) Whether it was error for the court to allow plaintiff to testify that every cent of the franchise fee would be spent in getting the operation going where this had not been pleaded nor mentioned in the plaintiff's memorandum.
- 6) Whether plaintiff by proceeding under the contract and accepting and consenting to a number of changes thereto ratified and confirmed the contract as changed and waived his right, if any, to damages for any prior breaches thereof.
- 7) Whether there was a breach of the contract as to the lease term arrangements, and, if there was, whether plaintiff was damaged thereby.
- 8) Whether there was a breach of contract as to the insurance terms, and if there was, whether plaintiff proved that he was damaged thereby.

- 9) Whether the court invaded the province of the jury in its instructions interpreting the lease term and insurance term provisions thereof.

IV. SPECIFICATIONS OF ERROR

- 1) It was error to allow plaintiff to testify as to statements made by Mr. Burko prior to the execution of the franchise agreement. The full substance of this evidence is set forth on page 5 herein.

The objections urged at trial by defendant to this testimony, in addition to the motion for protective order and for summary judgment as to plaintiff's second claim (R. 32) were as follows:

- (a) That such testimony tended to vary or contradict or explain the words of the printed contract, that it was in violation of the parol evidence rule and that it was offered to alter the stipulations of an express contract. (Tr. V.I, p.31).
- (b) That the questions called for answers to vary the terms of a written agreement, that it called for answers violating the parol evidence rule, and that it was legally inadmissible to alter the terms of the contract. That some of the representations were beyond the scope of the pleadings in the pre-trial order (Tr. V.I, p.42).

- 2) It was error to deny defendant's motion for partial summary

- judgment as to plaintiff's second claim and to deny any part of defendant's motion for protective orders (R. 32,35).
- 3) It was error to deny defendant's motion for directed verdict, (termed motion for nonsuit), as to plaintiff's second claim after completion of plaintiff's evidence (Tr.V.II, p.243).
 - 4) It was error to deny defendant's motion to strike all testimony relating to conversations between Mr. Burko, Mr. Alvarez, plaintiff and Mrs. Taute occurring prior to the signing of the franchise agreement (Tr.V.II, pp.243-246).
 - 5) It was error to deny defendant's motion for a directed verdict upon completion of all of the evidence (Tr.V.III, pp. 262-264).
 - 6) It was error for the court to give the following portion of Court's Instruction No. 1:

"Now, before Mr. Taute may recover on his first -- on his second cause of action, that is the fraud cause of action, he must prove the following: One, that Burko made false representations; two, that Burko knew those statements to be false, and if the statements were promises of what defendant would do in the future, that they were made without any intention of performing them; three, that Mr. Taute relied on these statements, and, four, that he was damaged. Now, in connection with damage, if you find that all of the foregoing is true; that is, that the plaintiff has proved these items by a preponderance of the evidence, then the measure of damage here is six thousand dollars. Diminished, however, by the amount that you find that this franchise was worth on August 17, 1963." (Tr.V.III, pp.281-282).

The objection urged at trial to this portion included that it omitted an important element of the definition of fraud, required to be proved, that of the right to rely upon the representations made, that there was no evidence in the record to

support this instruction and that the record showed as a matter of law that the plaintiff was not entitled to recover any damages on the grounds of fraud, that the evidence showed as a matter of law that the plaintiff confirmed the contract and waived his rights to damages for fraud (Tr.V.III, pp.274-275).

- 7) It was error for the court to refuse to give defendant's offered Instructions numbered 1, 2, 3, 4, 10, 11, 12 and 13 (R. 40-44, 47-51).
- 8) It was error for the court to instruct the jury as follows:

"With respect to the change in the insurance program you are instructed that it was the duty of the defendant to provide, without charge, collision insurance with one hundred dollar deductible. And I am satisfied that you know what a deductible policy is. Simply means that in the event of a collision and damage the insurance company does not pay the first hundred dollars. Now, unless you find that the defendant proposed an insurance change to which the plaintiff consented, and this could be proved by an oral agreement, as well as by letters or writings, then you may award the plaintiff the damage which he sustained. This damage would be measured by the premium charged for the months it was charged, plus the difference between the value of a collision policy with a one hundred dollar deductible clause and a policy with a two hundred fifty dollar deductible charge. This again spread over the months that the two hundred fifty dollar deductible policy was in force prior to the termination of the contract which was on February 15, 1965." (Tr.V.III, pp.283-284).

The grounds of the objections urged at trial were that the written instruments taken together and plaintiff's testimony indicate that the payment made by the plaintiff for the lease of the cars included the amount of the insurance and the evidence showed that the total amount paid by plaintiff to defendant for the lease of its cars was equal to or less than the amounts that he bargained for under the

original agreement, that this portion of the instruction invades the province of the jury and is not a proper measure of the damages (Tr.V.III, p.275).

9) It was error for the court to give the following instruction:

"With respect to the claimed breach of the leasing agreement, in this connection I instruct you that unless the plaintiff proposed a change to which the defendant agreed, then it was the duty of the defendant to provide automobiles to the plaintiff for a period of eighteen months after the initial dates of delivery. In this connection nine cars were delivered on October 23, 1963, and one car on November 1, 1963. Now, if you find that by reason of the changes in the lease terms, and specifically I refer to the length of the term of leasing or the turn-back provisions, and again I instruct you that it is necessary that these changes be not consented to by the plaintiff, and if you find that he suffered damage, then you may award him such damage as you may find from the evidence that he did suffer. In this connection, however, I should advise you that the defendant's obligations under exhibit six and seven expired within a few days of April 30, 1965, and so any change in leasing arrangements wouldn't be -- you couldn't consider any damages based upon a projection beyond that time." (Tr.V.III, 284).

The grounds of the objections urged at trial to this instruction included that the instruction was an improper interpretation of the language of the franchise agreement taken together with Plaintiff's Exhibit No. 7, that the evidence showed that plaintiff voluntarily assented to any change in the lease by voluntarily turning in his cars, and that it does not set forth a proper measure of damages (Tr.V.III, p.276).

Further objection was made that the instruction invades the province of the jury and interprets the contract contrary to the expressed terms of the contract themselves (Tr.V.III, p.286).

10) It was error to sustain plaintiff's objection to defendant's offered Exhibit No. 49 (Tr.V.III, p.256).

SUMMARY OF ARGUMENT

There is no competent evidence to sustain the verdict of \$6,000.00, or any verdict, on plaintiff's claim for damages for fraud in the inducement of the contract. The fraud claim is based solely on alleged oral misrepresentations made by franchise salesman Burko prior to the execution of the contract. All such representations were inadmissible because they related directly to the subject of the contract and tended to add to, vary, alter, and sometimes to contradict the express terms of the contract. All such negotiations and statements were superseded by the written agreement. The court erred in allowing testimony of any such statements.

The representations were all promises as to what would be done in the future except for one statement of an existing fact. The statement as to the existing fact was that Econo-Car International, Inc. had conducted a survey of Billings and as a result thereof knew of the three best locations for a car rental business. Plaintiff admitted that he was not damaged by reason of his location, stating that in his opinion he had a fine location and that he attributed none of his difficulties to his location.

The mere fact that a promise is not carried out is not proof that such promise was made with no intention to perform. There is no evidence that Burko did not intend to perform any of the promises he is said to have made. Without such evidence and regardless of the admissibility of the alleged statements, plaintiff cannot establish a case on the fraud claim.

There was also no evidence that plaintiff relied on

any of the representations except for the representation as to the three best locations, and as to that, plaintiff proved no damages. Fraud is never presumed and must be pleaded and proved. The proof failed here.

Plaintiff was allowed to testify that Burko had promised that the entire franchise fee would be spent on the grand opening. This was not pleaded and its admission was prejudicial error.

The court's charge to the jury omitted certain necessary elements of fraud.

Plaintiff waived any right that he may have had to sue for fraud by ratifying and affirming the contract, by assenting to and requesting changes in the contract, and by his election to "give it a go" under the contract after his early discovery of the alleged fraud at a time when the contract was largely executory. Defendant changed its position by reason of plaintiff's affirmance of the contract, and plaintiff cannot now recover damage for fraud in the inducement of the contract.

Plaintiff failed to prove a breach of the leasing terms of the contract and in any event failed to prove damages resulting from the alleged breach.

The court invaded the province of the jury by its peremptory instruction as to the meaning of the contractual provisions relating to the lease terms and the insurance coverage provisions of the contract.

ARGUMENT

A. THERE IS NO COMPETENT EVIDENCE TO SUSTAIN THE VERDICT FOR FRAUD (Plaintiff's Second Claim)

1. All testimony of statements attributed to Burko was inadmissible for the purpose of showing fraud in the inducement of the contract.

Franchise salesman Burko was said to have made certain false representations at and prior to the time of the execution of the franchise agreement. All such parol evidence was inadmissible under the rule that oral representations preceding the execution of a written contract, even though alleged to be fraudulent, are inadmissible to vary the terms of the contract where the representations relate directly to the matters dealt with in the agreement.

The oral representations to which plaintiff was allowed to testify fall into two categories: first, oral promises as to what would be done in the future relating directly to the subject matter of the written agreement, and, second, a representation as to an act which had been done by Econo-Car and as to knowledge which they then possessed. The promises were:

- (1) That defendant would send a three man crew to Billings to assist plaintiff in selecting a location for his car rental business and in getting the operation started,
- (2) That there would be three full page ads in the local newspaper in connection with plaintiff's grand opening,

(3) That plaintiff would have the option to decide the term of the lease between 12 and 18 months, and

(4) That every cent of the franchise fee would be spent in getting the operation going.

The representation as to the present fact was that Econo-Car had previously conducted a survey of Billings and that it knew the three top locations for a car rental business therein.

a. Statutes -

R.C.M. 1947, § 93-401-13:

"An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

"2. Where the validity of the agreement is the fact in dispute.

"But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 93-401-17, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

R.C.M. 1947, § 13-907:

"Written contracts--how modified. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

R.C.M. 1947, § 13-607:

"Effect of written contracts. The execution

of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

b. Cases on Parol Evidence Rule and Fraudulent Representations -

The leading Montana case setting forth the rule that evidence of oral representations relating directly to the subject of a contract, as opposed to evidence relating to an independent oral agreement on a collateral matter, is not admissible to alter the stipulations of a written contract, even if such representations are alleged to have fraudulently induced a party to enter into the contract is the frequently cited case of Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873 (1909). In Kelly v. Ellis plaintiff Kelly brought an action for damages for fraud or deceit alleging that he had entered into an oral contract, subsequently reduced to writing, with the defendant relating to the sale of a sheep ranch. The written agreement provided for the sale by Kelly to defendant of land, sheep and personal property in Sweetgrass County in exchange for a certain number of shares of capital stock, some cash and a promissory note. Plaintiff alleged that the prior oral agreement and specific oral agreement entered into at the time of the signing of the written agreement provided that he was to be the local manager of the sheep ranch. The complaint alleged that the defendant did not keep and never intended to keep the oral agreement, and that the oral promise was a "most important condition of the agreement", and but for the promise he would not have sold the property. The Supreme Court affirmed the trial court's action

the plaintiff was barred from recovery by R.C.M. 1947, § 93-401-13 (then § 7873, Revised Codes). The Court stated in part:

"The gist of the complaint is that they have not kept or performed the oral agreement to employ plaintiff as local manager, and that they never intended to keep that agreement when they made it. However, for the violation of that promise the statute stands as an insuperable barrier between plaintiff and any recovery, unless the promise to employ him was a matter collateral to the principal agreement.

* * *

"There is not any attack made upon the validity of the written agreement; and, since it appears from the complaint that at the time the plaintiff signed the written contract upon April 17th he fully understood and appreciated that it did not contain any provision for his employment as local manager, but nevertheless voluntarily signed it, he will not be heard to say now that such writing does not contain all the terms of the agreement for the sale of his real and personal property in Sweet Grass County, and he cannot bring himself within either of the exceptions noted in the statute above. However, the writing of April 17th, only superseded all the oral negotiations and stipulations between the parties so far as such negotiations and stipulations related to the matter of their agreement. The Code so provides in unmistakable terms: 'The execution of a contract in writing, whether the law requires it to be written or note, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' Section 5018, Rev. Codes. It did not necessarily supersede all their prior or contemporaneous negotiations; and, if the defendants by fraud or deceit, with respect to some collateral matter, induced the plaintiff to sign the writing, then he might be heard to complain.

* * *

"Unfortunately for plaintiff, he consented to the writing of April 17th, which completely superseded the prior oral negotiations, including the promise to employ him, and the statutes of this state now forbid him to say that there ever was any oral promise for his employment. In frankly stating all the facts out of which this controversy arose, the plaintiff has successfully pleaded himself out of court. His complaint does not state any

In Continental Oil Co. v. Bell, 94 Mont. 123, 21 P.2d 65 (1933) plaintiff and defendants entered into contracts for the purchase and sale of gasoline, which provided for the "price to be charged for gasoline . . . to be four cents per gallon less than the seller's quoted tank wagon price . . ."

21 P.2d at p. 66. Defendants testified that at the time the contracts were negotiated it was orally agreed that if at any time the contract price was more than the "spot market price", the defendants were to receive a refund of the difference between the two prices. The court held that such testimony was inadmissible, stating in part:

"The test as to when parol evidence varies, adds to, or contradicts a written contract was announced by this court in Hosch v. Howe, 92 Mont. 405, 16 P.(2d) 699, 700, quoting from Professor Wigmore as follows: 'The chief and most satisfactory index is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.'

* * *

"It is insisted that an oral contract which is the inducement of the written contract may be received in evidence. We recognize the existence of such a rule, but its application turns on the question of the admissibility of the evidence to establish fraud. The exception does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining party signed the instrument in reliance on such promise." 21 P.2d at 66-67.

In Leigland v. Rundle Land & Abstract Co., 64 Mont. 154, 208 Pac. 1075 (1922) an action was brought to foreclose a mechanic's lien when the defendant for whom a building was

constructed failed to make all payments allegedly due under the contract. The contract provided for a specific completion date and plaintiff failed to meet that date. Defendant sought to offset the rental value of the building for the period from the specified completion date to the actual completion date against the amounts plaintiff claimed to be due under the contract. Plaintiff alleged that prior to the signing of the agreement he advised defendant that because of business conditions he would not be able to complete the building by the specified date and that defendant thereupon agreed to eliminate a \$25.00 per day penalty clause from the agreement and "falsely and fraudulently" agreed not to hold plaintiff to the specified time limit for completion of the contract.

The Montana Supreme Court affirmed the trial court's finding that there were no misrepresentations or fraud and went on to point out that as a matter of law the evidence of the alleged oral agreement was inadmissible as attempt to vary the terms of the written agreement by parol evidence stating:

"However, the facts pleaded with reference to the oral agreement made prior to or at the time of the signing of the contract of March 30th do not warrant plaintiffs any relief, for it is an attempt to vary the terms of a written agreement by parol evidence.

(Quoting statute.)

"The terms of the agreement were reduced to writing by the parties and under section 10517, R.C.M. 1921, the written agreement is to be considered as containing all of those terms, and no evidence of the terms of the agreement other than the contents of the writing can be given except in the cases mentioned in subdivisions 1 and 2 of said section. This oral agreement is not collateral to, but a part of, the original agreement. Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873. The plaintiffs in this case may not now say that the original written

contract does not contain all the terms of the agreement, because they cannot bring themselves within either of the exceptions noted in the statute. Section 10517, R.C.M. 1921." 208 Pac. at p. 1078.

See also Biering v. Ringling, 78 Mont. 145, 252 Pac. 872 (1927).

In Warner v. Johns, 122 Mont. 283, 201 P.2d 986 (1949)

plaintiff wife brought an action against her former husband to collect \$400.00 which she alleged that the defendant had promised to pay her for not asking for suit money, attorneys' fees, costs or a division of their property in her divorce action. Among the allegations was that had it not been for the deception and fraud practiced upon her by the defendant in inducing her to sign a property settlement agreement not containing such provisions, she would have demanded a one-half interest in their property, costs and attorneys' fees. The trial court found for the plaintiff wife, but the Supreme Court reversed, stating in part:

"Defendant contends that the court erred in admitting evidence of the negotiations between the parties relative to the payment of \$400, it being his contention that the written agreement may not be altered by oral testimony regarding the prior negotiations.

* * *

"Plaintiff contends that the general rule stated in (R.C.M. 1947, § 13-607) has no application to separate and distinct oral agreements. But to come within that exception, this court in Continental Oil Co. v. Bell, supra, said the oral evidence 'must not in any way conflict with or contradict what is contained in the written contract. The written contract must remain intact after the reception of the parol evidence.' The effect of the oral evidence here was to change or add to the settlement agreement. Instead of plaintiff merely receiving the personal property which she had theretofore taken from the family home as stated in the written agreement she was to receive an additional \$400. This may not be shown by parol evidence." 201 P.2d at pp. 987-989.

There can be no question that the oral representations complained to be fraudulent were dealt with directly in the franchise agreement. Therefore, clearly and unequivocally under the above cases, all such parol testimony was inadmissible. Plaintiff's second claim, for damages for fraud, therefore fails completely because it was based solely upon the alleged fraudulent representations.

Plaintiff is not seeking to rescind the contract, but instead has affirmed the contract and is seeking damages for the alleged breaches thereof in his first claim and damages for fraud in the inducement in his second claim. Thus, we are not concerned here with those cases where parol evidence has been admitted to show that a contract had never taken effect or that what appeared to be a contract was in fact not a contract. Neither are we concerned with cases holding that a purchaser under an executed or nearly executed contract of sale can maintain an action for fraud against the seller for damages for false representations in the inducement of the contract where these representations relate to existing facts as to the quality of the property. A case of this type is Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933 (1920), in which the court held that false statements as to the amount of hay previously produced by land, the number of acres of good bottom land in an inaccessible area, and the number of acres in another tract of land were admissible in an action for damages for fraud. These representations in Koch v. Rhodes, *supra*, were representations as to present facts going to the quality of the product, whereas here we have alleged promises of future

performance of conditions directly dealt with in the contract.

2. Plaintiff failed to plead and prove all necessary elements of fraud.

a. Elements of Fraud -

The applicable law relating to the elements of fraud and the proof thereof is set forth in Lee v. Stockmen's National Bank, 63 Mont. 262, 207 Pac. 623 (1922) as follows:

"As defined in our statute, (R.C.M. 1947, § 13-308), 'Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (3) The suppression of that which is true, by one having knowledge or belief of the fact; (4) A promise made without any intention of performing it; or, (5) Any other act fitted to deceive.'

"As to whether actual fraud has been practiced is a question of fact (sec. 7482, Rev. Codes 1921), and the burden of proof is upon the one who alleges it. (Lindsay v. Kroeger, 37 Mont. 231, 95 Pac.839.)

"In order to go to the jury the plaintiff must make out a prima facie case embracing the elements of actual fraud, viz.: (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. (26 C.J. 1062.)" 63 Mont. at pp. 283-284.

b. Plaintiff Failed to Prove Material Elements of Fraud -

Assuming arguendo that the oral representations, or some of them, were admissible on the fraud claim, plaintiff has

nonetheless failed to prove essential elements of fraud. For example, there is no testimony to the effect that Burko's promises, if made, were made without any intention on his part that they be performed. Neither is there any testimony in the record to the effect that plaintiff relied upon the representations, except plaintiff's testimony that he relied upon the statement that Burko knew the three top locations in town (Tr.V. I, p. 39).

All but one of the oral representations are clearly promises as to what would be done in the future. The only representation as to an existing fact is this same testimony as to defendant's knowledge of where the three top locations for a car rental business were. It is significant that the plaintiff testified that he selected his location, that he had no complaints with respect to the location, that he felt it was a very fine spot, and that he did not attribute any of his later difficulties to the location of his business. (Tr.V.II, pp. 133-134). Thus, by plaintiff's own affirmative testimony, no damages flowed from the only oral representation which could be taken as a representation of an existing fact at the time of the execution of the contract, and the only representation as to which plaintiff testified he relied upon. Even as to this representation as to the selection of a location plaintiff's actions showed his complete lack of actual reliance thereon when he wrote to Paul McPeake (Dfdd.'s Exh. 23) apologetically soliciting advice as to his proposed locations stating:

"Paul, know I'm asking a lot--but--would you study this and call me with your recommendation. I'm not trying to put you on the spot--but I would like to draw on your experience--"

With but the one exception mentioned above all the representations alleged to have been made by Burko were promises to perform acts in the future. No proof was offered that at the time of making the promises there was no intent of performing them. Actual fraud is never presumed on the mere fact that a promise is not carried out, is not proof that such promise was made with no intention to perform. Montana law could not be clearer on this point:

"It is well settled law that the mere fact that a promise is not carried out is not proof that such promise was made with no intention to perform."
Reilly v. Maw, 146 Mont. 145, 405 P.2d 440, 445 (1965).

"It is manifest there is ample evidence to prove each of the foregoing stated matters, except the allegation, a most essential one, that, when defendant made his promise, he had no intention of performing it, and, consequently, in analyzing the evidence, we now address ourselves particularly to that point.

* * *

"In this case, the record fails to disclose a particle of evidence to prove or tending to prove that, when defendant made his promise, he had no intention of performing it. * * * Plaintiff's testimony, however, does not shed a particle of light upon whether or not defendant, at the time he made the promise, intended to perform it. Plaintiff's testimony leaves us totally in the dark upon that point, except for the presumption of law that when defendant made the promise he intended to perform it. That is the presumption. Good faith is presumed; fraud is never presumed. The burden of proving it is on the party alleging it." Cuckovich v. Buckovich, 82 Mont. 1, 264 Pac. 930, 932 (1928).

"If fraud, other than that just considered, existed, it was only by reason of the making of a promise 'without any intention of performing it' . . .; but here both the pleading and the proof fall far short of making a case of fraud, as it is

that Elston did not intend, at the time the promise was made, to perform it; the allegations of the complaint and the testimony of the defendant go no farther than to charge that the promise was not performed. Defendant was not, therefore, entitled to go to the jury on this defense of fraud." Howe v. Messimer, 84 Mont. 304, 275 Pac. 281, 283 (1929).

"The mere making of a promise which the promisor fails to keep does not constitute actionable fraud. (Citing cases.)

"There being no allegation in the answer, nor proof that Bell did not intend to keep his promise to cancel and return the papers to defendants, and no offer by defendants to perform their part of the settlement agreement by payment of the money, defense upon that ground is not sustained." International Harvester Co. v. Merry, 60 Mont. 498, 199 Pac. 704, 706 (1921).

See also Marlin v. Drury, 124 Mont. 576, 228 P.2d 803 (1951).

c. Fraud Must be Pleaded and Proved -

Despite the liberality of pleading under the Federal Rules of Civil Procedure it is nevertheless necessary to plead fraud with particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides as follows:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

In Brooks v. Brooks Pontiac, Inc., 143 Mont. 256, 389 P.2d 185 (1964) the court stated with regard to pleading and proof of fraud the following:

"We return now to the allegation of the bare conclusion 'constructive fraud' previously alluded to. It has always been the rule in Montana that fraud is never presumed, and that such a charge must be sustained by the allegations and proof of the facts constituting the fraud. See Teisinger v. Hardy, 86 Mont. 180, 282 P. 1050, and Costello v. Shields, 99 Mont. 335, 43 P.2d 879. The rule is set forth in Rule 9(b). M.R.Civ.P.:

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. * * *"

"Not having allegations of fact from which the conclusion of 'constructive fraud' might be reached, the attempt to state a claim for relief as a derivative action, as here, fails." 389 P. 2d at p. 188.

Damage is an essential element of fraud in Montana. In Holland Furnace Company v. Rounds, 139 Mont. 75, 360 P.2d 412 (1961) the court stated:

"Damage, injury, or prejudice from reliance on fraudulent representation is a necessary element of fraud whether fraud is being advanced as a ground for recovery or defense." 360 P.2d at p. 415.

Nowhere has plaintiff pleaded the materiality of the representations, his ignorance of the falsity of the representations, his reliance and his right to rely upon the truth of the representations, and his consequent and proximate injury by reason of his reliance.

B. THE JURY WAS IMPROPERLY INSTRUCTED ON THE ELEMENTS OF FRAUD

The court's instruction to the jury on the elements of fraud is set forth in the Statement of the Case, supra, p. 10. No mention is made in this instruction of the following essential elements:

- (1) That plaintiff had a right to rely upon the representations;
- (2) That the representations were material;
- (3) That Mr. Burko intended that they should be acted upon;

(4) That plaintiff was actually injured by reason of the representations.

With respect to the measure of damages, the court was quite correct in limiting the damages to the amount paid for the franchise in view of plaintiff's early knowledge of the falsity of the representations. However, the court was not correct in stating that the measure of damage was \$6,000.00 less what the jury found the franchise was worth on August 17, 1963, the date that the plaintiff discovered the falsity of the representations. At most, the damages should have been limited to the difference in value of the franchise from what it was as opposed to what it would have been had the representations as alleged been true as limited by the amount paid for it.

C. THE COURT ERRED IN ALLOWING PLAINTIFF TO TESTIFY AS TO ALLEGED MISREPRESENTATIONS NOT PLEADED

Also very important is the alleged representation concerning which plaintiff was allowed to testify which had not been pleaded or mentioned in the pre-trial order that the entire franchise fee of \$6,000.00 would be used for the initial opening. This was particularly prejudicial and must have contributed to the inflaming of the minds of the jury on the fraud question. We submit that such a highly inflammatory representation must be pleaded and that it was error for the court to allow plaintiff to testify thereto. The defendant might well have been able to take some measures for defense against such an allegation had it been anticipated and had it not come as a surprise.

D. PLAINTIFF WAIVED ANY RIGHT HE MAY HAVE HAD TO SUE FOR DAMAGES FOR FRAUD

1. Argument on the Facts -

Plaintiff's theory was that after discovery of the falsity of the alleged representations, he affirmed and chose to proceed with the contract but preserved his right to sue for damages for fraud in the inducement thereof. We contend that under the circumstances here, his continuing with the contract was a waiver as a matter of law of his right, if any, to recover damages for fraud in the inducement.

The evidence is uncontradicted that the plaintiff discovered the falsity of the alleged representations in August of 1963. This was nearly two months prior to the time that he quit his job, received delivery of any cars and commenced operations. At that time he had not changed his position in any respect except for the payment of the franchise fee and the initial car rentals. At that time the contract was almost wholly executory. At that time it would have been a relatively simple matter to effectuate a rescission, if he were entitled to such relief. Instead, Carl Taute knowingly and deliberately elected to "give it a go" under franchise agreement and to try out the business.

Plaintiff's election to go ahead when he knew of the falsity of the alleged representations caused defendant to change its position to its detriment. Among other things, Econo-Car International, Inc. supplied plaintiff with the dealer's kit, advertized for his grand opening, sent a man to Billings for two days to assist the plaintiff to get his

business operating smoothly and to check operations and answered numerous letters and phone calls. In addition, plaintiff's election prevented Econo-Car from seeking another franchisee who may have been willing to continue to operate the business permanently. Thus, defendant has clearly been prejudiced if it now is required, in addition to the above changes of position, to return the \$6,000.00 paid by Taute for the franchise. Is not plaintiff now estopped from claiming damages for the alleged fraud and barred by laches from pressing this claim? This situation is unquestionably illustrative of why the courts will generally hold that a plaintiff electing to affirm and ratify an executory contract waives any right to sue for damages for fraud in the inducement; whereas, if the contract is executed or nearly all executed when a party discovers fraud, he may be entitled to affirm the contract and sue for the fraud.

During the course of the operations, Carl Taute did numerous things which tended to indicate his decision to ride with the contract and not seek damages from Econo-Car. For instance, he humbly requested assistance of Paul McPeake in selecting a location in his letter dated September 14, 1963 (Dfdt.'s Exh. 23). In his termination letter mailed more than a year later, November 14, 1964, (Pltf.'s Exh. 21) in stating that the only criticism he had to offer was toward himself, that he simply bit off more than he could chew. In his letter of December 3, 1964, subsequent to his termination letter, he offered to continue the business if the company would put up a

considerable correspondence between the parties to mention, suggest or complaint about Burko's representations in any way.

Finally, the plaintiff entered into new engagements concerning the subject matter of the contract, such as advertising changes, reductions in rental payments on the automobiles, changes in insurance premiums, he borrowed money from Econo-Car International, Inc., and of course, he impliedly agreed to proceed under the contract knowing that the promises as he understood them would not be carried out. These activities bring him under the rule that if a party claiming to have been defrauded enters after the discovery of the fraud into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he will be deemed to have waived any claim for damages on account of fraud.

2. Law on Waiver of Fraud -

Plaintiff's complaint appears to be founded upon the theory that the defendant was guilty of fraud in the inducement of the contract, and therefore, plaintiff was entitled to damages in the nature of restitution or rescission. But in the same complaint, plaintiff sought damages for breaches in the contract. These two theories are, of course, mutually exclusive and plaintiff was faced with the choice of either affirming the contract and attempting to recover some damages for the alleged fraud in the inducement and for the breach of contract, or of contending that he wanted the contract rescinded and was entitled to restoration of everything of value contributed by him. Plaintiff prior to trial elected to seek damages by way of breach of contract and damages for fraud in the inducement

while at the same time affirming and ratifying the contract. There are numerous Montana cases holding that a contract must be promptly rescinded upon discovery of fraud, or the plaintiff will have been held to have ratified the contract and waive the fraud:

Lommasson v. Hall, 111 Mont. 142, 106 P.2d 1089 (1940);

Beebe v. James, 91 Mont. 403, 8 P.2d 803 (1932);

Williams v. Hefner, 89 Mont. 361, 297 Pac. 492 (1931);

Lasby v. Burgess, 88 Mont. 49, 289 Pac. 1028;

McConnell v. Blackley, 66 Mont. 510, 214 Pac. 64 (1923);

Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911).

Under certain circumstances it appears that a person who has been injured by fraudulent acts of another may affirm the transaction and sue for damages.

"It is elementary that a person injured by the fraudulent acts of another may elect to rescind or may affirm the transaction and sue for damages."
Como Orchard Land Co. v. Markham, 54 Mont. 438, 171 Pac. 274, 275 (1918).

Here, however, we contend that this rule is not applicable and that plaintiff actually waived his right, if any, to sue for damages for fraud because of his early knowledge thereof and his thereafter proceeding under the contract as if the fraud had never occurred. This question is discussed at some length in Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933 (1920) as follows:

"Appellants contend that the evidence shows a condonation of all fraud and fraudulent representations charged and waiver of all possible right of action for the same, because of the fact that respondent, after the commencement of this action, paid an installment falling due January 1, 1961. It is to be noted in this connection that respondent had been let into possession of the premises on July 11, 1915, and has paid to appellants \$5,500. that he had elected

to proceed under the contract rather than to rescind it, and sue for damages for the alleged fraudulent representations.

* * *

"Under our statutes and under the authorities, one who has been fraudulently induced to enter into a contract has the choice of either rescinding the contract (Rev. Codes, § 5063) by restoring or offering to restore what he has received under the contract, and recover what he has parted with, or he may affirm the contract, keeping whatever property he may have received or advantage gained, or sue in an action for deceit for the damages suffered by reason of the fraud. While the affirmance of the contract precludes him thereafter from rescinding, he may still sue for damages, unless he waives that right. *Como. Orchard Co. v. Markham*, 54 Mont. 438, 171 Pac. 274. On the other hand:

"An executory contract which has been procured by fraud is not binding upon the party against whom the fraud has been perpetrated. He may, after discovering the fraud, either perform it or rescind it; and if, with knowledge of the fraud, he elects to perform it, this is equivalent to his making a new contract, and to permit him under those circumstances to recover for fraud would be to do violence to every rule upon which compensatory damages are allowed." *McDonough v. Williams* 77 Ark. 261, 92 S.W. 783, 8 L.R.A. (N.S.) 452, 7 Ann.Cas. 276.

* * *

"And while by an affirmance of the contract one may waive, not only his right to rescind, but also his right of action for the deceit, it is only when such an intention is clearly manifested that such a waiver will be declared. There is a clear distinction between the waiver of the right to rescind and the waiver of the right of action. This is pointed out by Mr. Cooley in his work on Torts, par. 257, as follows:

"The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having the right to complain of the fraud had freely

some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception'." (188 Pac. at pp. 937-938). (Emphasis ours).

While involving an action for the cancellation of contract for the sale of real and personal property and for the return of certain money paid under the contract, rather than for actual damages for fraud in the inducement, in Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911), the court discussed at length questions concerning waiver of fraud which are pertinent here. The court stated in part:

"During all this time, plaintiff remained in possession of the premises and used them and appropriated the 1907 crops to his own use. Since fraud in the inducement of a contract does not make it void, but only voidable (Turk v. Rudman, 42 Mont. 1, 111 Pac. 739), it was within the power of Ott to rescind or to treat the first contract as valid (1 Page on Contracts, § 139; 9 Cyc. 432, 436); and his continuing in possession of the property and his payment of the delinquent installment after discovering the fraud amounted to an affirmance of the first contract and constituted a bar to a rescission (citing cases). In Grymes v. Sanders, 93 U.S. 55, 23 L.Ed. 798, the rule is stated as follows: 'Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had theretofore subsisted.' So, also, the substitution of the new contract for the old one amounted to a waiver of the fraud which entered into the execution of the old one." (115 Pac. at p. 39). (Emphasis ours).

In Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953) the court held among other things, that there had been a waiver of the requirement of approval of a contract by the FHA. The

court stated in connection therewith:

"The approval by the agency was a condition precedent to the actual carrying out of the contract and ceased to be such by reason of the waiver.

"A waiver may be by mere voluntary expression of waiver and nearly always by continuing to render performance or by receiving further performance from the other party, with knowledge that the condition has not been performed. 3 Corbin on Contracts, § 755, p. 918." (254 P.2d at p. 1079).

If a party claiming to have been defrauded enters after the discovery of the fraud into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he will be deemed to have waived any claim for damages on account of the fraud. An excellent statement of this rule is found in the California case of Schied v. Bodinson Mfg. Co., Cal.App. 1947, 179 P.2d 380, as follows:

"The authorities are uniform in holding that a party to an executory contract, who, with full knowledge of the facts constituting the fraud complained of, subsequently, with intention to do so, affirms the contract and recognizes it as valid, either by his written agreement or by acts and conduct, and accepts substantial payments, property or the performance of work or labor not required by the original contract, thereby waives his right to damages on account of the fraud. * * *

"The rule with respect to waiver of fraud is stated in Burne v. Lee, supra, as follows:

"Now, it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limita-

been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud. The rule is clearly expressed in Schmidt v. Mesmer, 116 Cal. 267, 48 P.54, where it is said:

""If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud."'
(italics added).

"The foregoing rule has been consistently followed in numerous cases. It is the accepted rule in all jurisdictions." 179 P.2d at p. 385.

Other cases involving waivers of provisions in a contract or the substitution of an executed oral contract for a provision in a contract are Dalacow v. Geery, 132 Mont. 457, 318 P.2d 253 (1957) and Flint v. Mincoff, 137 Mont. 549, 353 P.2d 340 (1960).

E. ALL TESTIMONY OF STATEMENTS ATTRIBUTED TO BURKO PRIOR TO OR AT THE TIME OF THE EXECUTION OF THE WRITTEN CONTRACT WAS INADMISSIBLE AS VARYING, ADDING TO, CONTRADICTING OR ALTERING THE WRITTEN CONTRACT

We have dealt with the parol evidence rule at some length in a preceding section of this brief with the emphasis there on its application to alleged fraud in inducement of a contract. Here, plaintiff has also contended that the alleged oral representations were admissible to explain the circumstances under which the contract was executed and to explain

ambiguities in the contract itself. There are a great many of cases in which evidence of oral negotiations and alleged agreements made at or prior to the execution of written instrument have been excluded by reason of the parol evidence rule. We wish to call the court's attention to a few of these cases.

In Riddell v. Peck-Williamson Heating & Ventilating Co., 27 Mont. 44, 69 Pac. 241 (1902) plaintiff subcontractor entered into a contract with the defendant to supply certain labor and materials in connection with the construction of the agricultural building at M.S.C. in Bozeman. When the greater portion of the materials and labor had been furnished and performed by plaintiff, plaintiff abandoned the work because defendant refused to pay for the labor and material already performed and furnished and sued the defendant for the value thereof. Plaintiff alleged that at the time that the written agreement was executed, an oral agreement was entered into that payments should be made, in conformity with a usage and custom, as the work was done and the material furnished. The written contract, itself, contained no express provision as to when the payments should be made, although the court did state that the intention of the parties from the agreement as a whole was that defendant should not become indebted to the plaintiff until all material was furnished and all labor performed. The court held that evidence as to the alleged oral agreement should have been excluded. The court stated in part:

". . . It is perfectly clear that the evidence was erroneously received. The rule which prohibits the reception of evidence of oral promises or agreements made prior to or contemporaneously with the execution of a written contract purporting to embrace all its

from the express terms, is declared and interpreted by the decisions of this court, as well as prescribed by statute. (Citing cases). This rule is applicable to oral negotiations and agreements which vary the legal construction and import of a written contract, although they do not contradict its express terms." (Emphasis ours). 69 Pac. at pp. 242-243.

In Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 Pac. 316 (1921) plaintiff brought an action for a breach of warranty of a threshing machine, on which a written warranty had been given by the defendant. Plaintiff contended that in addition to the written warranty, plaintiff's local sales agent made certain oral warranties and representations. The trial court excluded all evidence touching upon the prior statements and representations of the local agent in making the sale. The Supreme Court affirmed, stating in part:

"If in the warranty that the machinery ordered is 'to be well made, of good material, and with proper use and management to do as good work as any other machine of the same size manufactured for a like purpose' was comprehended a warranty that the thresher to be furnished would thresh and clean alfalfa as well 'as any other machine of the same size manufactured for a like purpose,' the written contract was complete and must be taken as a full expression of the agreement between the parties. This is so because therefrom it will be presumed that every material item and term has been placed therein. In such case parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids addition by parol where the writing is silent, as well as to vary where it speaks.

* * *

"The contention that, because 'the written contract is silent as to the special purpose for which the machine was bought,' the parol understanding between the local agent and the plaintiffs can be read into it, * * *

"To allow a claim of this sort to be maintained where the parties have put their engagements in writ-

warranties, and to completely ignore the rule that parol agreements leading up to the written contract are merged in it." 201 Pac. at p. 318.

In Cook v. Northern Pacific Railway Co., 61 Mont. 573, 203 Pac. 512 (1921) plaintiff shippers brought an action against defendant railroad for damages to shipments of lambs sent by railway from Montana to Chicago. The Supreme Court upheld the District Court's order striking all evidence relating to certain negotiations between the parties and oral directions given by the plaintiffs as to stops intransit, all as being in violation of the parol evidence rule, stating in part:

"The negotiations between the parties and the directions, given by the shipper preceding the execution of the contract and acceptance of it by him, are presumed to have been merged in the contract itself when it has assumed its final form, and evidence of terms other than those contained in it become wholly incompetent, unless a mistake or imperfection in it has been put in issue by the pleadings, or its validity has become the fact in dispute, or it has become necessary to explain an intrinsic ambiguity in the contract or to establish illegality or fraud." 203 Pac. at 515.

In Burnett v. Burnett, 68 Mont. 546, 219 Pac. 831 (1923) the court held that where a note left blank the amount of interest to be charged, oral testimony that the parties understood that the note was to be noninterest bearing was held to be inadmissible, the court stating in part:

"In the absence of fraud or mistake, neither of which is alleged in the present case, 'when the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing.' Section 10517, Rev. Codes, 1921. In this case the best and only evidence of the contract is the writing itself. Id. 10516.

"The written contract superseded all prior negotiations and agreements, and to it alone must we look to determine the obligation of the defendant. (Citing cases).

"Evidence offered to show the understanding of the parties as to the payment of interest at the time of the execution of the note was properly excluded." 219 Pac. at p. 832.

The circumstances suggesting that it would be proper to allow parol evidence to explain or add to the terms of a contract would certainly have been greater in the above case, than in the instant case. Yet, this case along with a number of others cited herein illustrate the vigorousness with which the Montana Supreme Court has followed the parol evidence rule. See also Leigland v. McGaffick, 338 P.2d 1037, 135 Mont. 188 (1959); Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064 (1911); Hosch v. Howe, 92 Mont. 405, 16 P.2d 699 (1932); Armington v. Stelle, 27 Mont. 13, 69 Pac. 115 (1902); Ryan v. Ald, Inc., 146 Mont. 299, 406 P.2d 373; Ikovich v. Silver Bow Motor Car Co., 117 Mont. 268, 157 P.2d 785 (1945); Union Electric Co. v. Lovell Livestock Co., 101 Mont. 450, 54 P.2d 112 (1936); Linn v. French, 97 Mont. 292, 33 P.2d 1002 (1934); and Swan v. LeClaire, 77 Mont. 422, 251 Pac. 155 (1926).

There are a number of Montana cases in which the Supreme Court has allowed parol evidence under one of the exceptions to the parol evidence rule. Cases of this type which we have examined are clearly distinguishable from the present facts and no attempt will be made to discuss them all here. We are listing three examples of types of such cases which we believe to be typical:

Platt v. Clark, 141 Mont. 376, 378 P.2d 235 (1963)
(Court admitted parol evidence to show that the contract had never taken effect.)

Hammond v. Knievel, 141 Mont. 433, 378 P.2d 389 (1963)
(Evidence admitted to show that what appeared to be a contract was in fact not a contract.)

New Home Sewing Machine Co. v. Songer, 91 Mont. 127, 7 P.2d 238 (1932)

(Court allowed oral testimony to explain the term "finance plan" contained in an order for 20 sewing machines where radically different versions of what the term meant were presented by the parties, and where the writing clearly and on its face did not contain all of the terms and conditions of the agreement.)

The trial court ruled that the word "guidance" as used in paragraph 4. C. of the contract and other words of the contract were ambiguous and that the oral representations were admissible to explain the meaning thereof. We vigorously contend, however, that the word "guidance" as used and explained in the contract (see page 6, supra) is clearly not ambiguous and that any outside evidence to explain the meaning of the word is in clear violation of the parol evidence rule as interpreted by the Montana State Supreme Court. Instead of explaining the meaning of "ambiguous" terms or explaining the circumstances surrounding the execution of the contract, the representations here add to, vary, amplify and in some respects contradict the language of the contract and are therefore to be excluded.

F. THERE WAS NO BREACH OF CONTRACT AS TO THE LEASE TERM ARRANGEMENTS AS A MATTER OF LAW

As is evident from the statement of facts (p. 2, supra) the franchise agreement (Pltf.'s Exh. 6) contemplated

that there would be periodic changes in the basis for supplying rental cars to the local dealers. For example, paragraph 5. C. provides that vehicles would be acquired by the Econo dealer on the basis described in Schedule "B" to the franchise agreement, or "upon such other basis as may be presented by Econo-Car for the benefit of the entire Econo-Car rental system." This is entirely logical in view of the constantly changing conditions and terms under which Econo-Car International, Inc. would be able to acquire the cars from Chrysler Leasing Corporation or from any other firm. They would certainly want to remain flexible as to such arrangements.

The lease term in the original franchise agreement was simply from "12 months to a maximum of 18 months", with no comment as to who had the option. However, on August 17, 1963, the plaintiff signed Exhibit No. 7 providing for an 18 month term with Econo-Car International, Inc. having the absolute right to terminate the lease at any time following the twelfth month. Later on, it was announced that the 1964 automobiles would be available on a 12 month leasing term, instead of the previous 18, and finally Econo-Car International, Inc. offered the 1965 cars on a 6 month leasing term with it having the option to extend by one month and with the dealer having the option to extend by 6 months. We submit that these changes were violative of the terms of and in fact contemplated by the basic franchise agreement. In addition plaintiff has completely failed to show that he was damaged by any of these changes in lease terms, and for that matter, it is implicit in the evidence and is apparent by the use of common sense that the

shorter the lease term within limits upon which these cars are available, the greater advantage to the local Econo dealer.

Much controversy occurred during the trial with respect to the so-called "turn in" requirements. It is worthy of note that Plaintiff's Exhibit 6 does not specify any such turn in requirements. Plaintiff complained bitterly at the trial that he was billed for over \$400.00 worth of turn in charges at the time he surrendered his automobiles. Upon cross-examination, however, it was brought out that Econo-Car International, Inc. went to bat for the plaintiff with Chrysler Leasing Corporation and effectively got the turn in charges reduced. The maximum possible damages which he proved in this connection, even if it be assumed that the requirements were tied in to the basic franchise agreement was by plaintiff's own testimony \$20.50 for one tire.

G. THE COURT ERRED IN INVADING THE PROVINCE OF THE JURY IN ITS INTERPRETATION OF THE LEASE TERM PROVISIONS AND THE INSURANCE TERM PROVISIONS OF THE CONTRACT

In instructing the jury on the lease term provisions, the court peremptorily charged them that unless they found there was modifications assented to by the plaintiff, he was entitled to any damages for an early termination of the 18 month lease term set forth in Plaintiff's Exhibit 7. We feel that this was error.

The court also instructed the jury that the defendant breached the insurance term provisions and that the plaintiff was entitled to the difference in the insurance premiums for \$100.00 deductible and \$250.00 deductible. We feel that

this was clearly error, in view of the uncontradicted testimony that the monthly rental payments to Econo-Car International, Inc. for rental, insurance, etc. were consolidated and that at all times during the operations plaintiff was paying an amount equal to or less than that required by his original franchise agreement for the automobiles.

The court was, of course, correct in instructing that the plaintiff had failed to prove any damages by reason of the alterations in the advertising program. In fact, the plaintiff had received considerably more than he was entitled to under the original franchise agreement.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be vacated and judgment entered for the defendant.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER


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Billings, Montana 59101
Attorneys for Defendant and
Appellant Econo-Car
International, Inc.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of April, 1968,
I deposited in the Post Office at Billings, Montana, in an
envelope securely sealed, with postage thereon prepaid, and
addressed to:

John C. Sheehy, Esquire
Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Building
Billings, Montana 59101,

true and correct copies of the foregoing Brief of Appellant
Econo-Car International, Inc.


One of the Attorneys for Defendant and
Appellant Econo-Car International, Inc.

ECONO-DEALER APPOINTMENT PROGRAM
AND AGREEMENT

ECONO-CAR

8

PARTIES:

A. ECONO-CAR INTERNATIONAL, INC., a New Jersey Corporation having its principal office and place of business at 520 Westfield Avenue, Elizabeth, New Jersey, referred to in this agreement as "ECONO-CAR".

B. Carl M. Trout, a _____ (STATE) (corporation)
(partnership) (individual proprietorship), having its or his principal office and place of business at
2112 Green Terrace Drive in the city of Billings,
Montana (ADDRESS)
(STATE) and referred to in this agreement as "THE ECONO-DEALER".

EXCLUSIVE FRANCHISE:

Upon the acceptance of this agreement and the payment by Applicant of the sum of \$ 6,000.00 in cash or certified check, as a franchise fee, ECONO-CAR does hereby award to the ECONO-DEALER the exclusive license for the operation of a daily rent-a-car business to the public under the trade names "ECONO-CAR" and "ECONO-CAR RENTAL SYSTEM" for:

Yellowstone County, Montana.
Fort Yellowstone, Big Horn, Montana, Teton, Montana
Billings City, Montana, Cody, Wyoming, Shoshone, Wyoming

TERM:

This agreement shall continue for a term of fifteen (15) years unless terminated sooner for any reason provided in paragraph "12", and may be renewed for successive fifteen (15) year periods at the option of the ECONO-DEALER at no additional cost, provided that the ECONO-DEALER has complied with the obligations set forth in this agreement.

ECONO-CAR AGREES:

- A. To permit the ECONO-DEALER, throughout the term of this agreement, to use its trademarks, trade names, logotypes and service marks in accordance with company policy and specifically, to display the names ECONO-CAR and ECONO-CAR RENTAL SYSTEM prominently in all local advertising and at the ECONO-DEALER's premises.
- B. To ship the ECONO-DEALER immediately upon the acceptance of this agreement, the Basic ECONO-DEALER's Kit described in the schedule "A" annexed to this agreement and made a part hereof.
- C. To furnish guidance to the ECONO-DEALER in establishing, operating, and promoting the business of renting automobiles, with respect to:
 - a) The selection of premises for the establishment of places of business.
 - b) The institution and maintenance of effective and proven office management systems and business operations procedures.
 - c) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the Basic ECONO-DEALER's Kit, as and when such aids are developed by ECONO-CAR's staff.

- D. To make available to the ECONO-DEALER at all times a quantity of automobiles for use in the daily rent-a-car business on the most favorable terms available. These vehicles may be made available to the ECONO-DEALER on the basis of sale, lease, or whatever other method or methods that ECONO-CAR shall negotiate in behalf of all of its ECONO-DEALERS.

ECONO-CAR will, in every case, deliver to the ECONO-DEALER as many cars as the ECONO-DEALER may request, subject to the ECONO-DEALER's financial status and ability to meet existing business obligations.

- E. To provide the ECONO-DEALER, at no additional expense, with standard-type automobile insurance providing the following coverage: Automobile public liability and property damage insurance with limits of not less than \$250,000. for any one person for bodily injury or death and \$500,000. for any one accident for bodily injury or death; \$25,000. insurance for property damage; collision insurance with no more than \$100 deductible, and automobile and physical damage insurance which shall include fire, theft and combined additional coverages, including vandalism and malicious mischief, with a \$50. per loss deductible. Coverage shall extend to the ECONO-DEALER, his agents and employees and those who rent from the ECONO-DEALER in the course of his operation of a bona fide rent-a-car service.
- F. To pay to every ECONO-DEALER in good standing a cooperative advertising allowance of up to \$7.50 per month per car operated by the ECONO-DEALER during the preceeding month, upon receipt of proof of local advertising by the ECONO-DEALER in the minimum amount of \$15.00 per month per car; classified directory advertising shall not be eligible for this allowance.

THE ECONO-DEALER AGREES:

- A. To devote sufficient time and best efforts to the development and growth of the auto rental business as a member of the ECONO-CAR RENTAL SYSTEM.
- B. To advertise and promote the ECONO-DEALER's association with the ECONO-CAR RENTAL SYSTEM through the use of the trade names and styles designated by ECONO-CAR. The ECONO-DEALER may not use the name ECONO-CAR, in whole or in part, within the ECONO-DEALER's corporate or official business name, but shall, nevertheless, prominently display or use in predominant size the names ECONO-CAR and ECONO-CAR RENTAL SYSTEM in all advertising, signs, displays, literature, letterheads, etc.
- C. The ECONO-DEALER agrees to add to his fleet of operating vehicles (excluding replacement vehicles) a minimum of 1 autos during each quarter of the first two years of this agreement and a minimum of 4 autos each year thereafter for three (3) successive years. No additions will be required thereafter, but the ECONO-DEALER shall at all times maintain an active fleet of at least the same size as exists at the end of the fifth year; all vehicles must be acquired by the ECONO-DEALER on the basis described in schedule "B", or upon such other basis as may be presented by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM.
- D. To maintain the ECONO-DEALER's place or places of business and the ECONO-DEALER's vehicles in a clean and presentable condition, and all vehicles shall be physically maintained in top operable condition.
- E. To operate the ECONO-DEALER's business in accordance with sound business principles, while adhering to the standards set in the ECONO-DEALER's Manual, and to any modifications or changes which may be promulgated from time to time by ECONO-CAR for the benefit of the entire ECONO-CAR RENTAL SYSTEM and each of its ECONO-DEALERS.
- F. To charge to the public for the rental of motor vehicles, a sum no greater than the rate fixed, from time to time, by ECONO-CAR.
- G. To make available to ECONO-CAR or to its duly authorized representatives, for purposes of inspection only, the ECONO-DEALER's books and records; such inspections shall take place only during ordinary business hours.

H. To proceed immediately to obtain a listing and a display advertisement in all classified telephone directories servicing the territory covered by this agreement.

I. To pay any and all federal, state, city or local taxes, fines or assessments that concern the operation of the ECONO-DEALER's business, his stock of vehicles or his assets.

NATIONAL PROMOTIONS:

ECONO-CAR may, from time to time, engage in national contests and promotions for the benefit of the entire ECONO-CAR RENTAL SYSTEM. In the course thereof, ECONO-CAR may be required to issue "due bills" which shall be redeemable by contest winners and other recipients, at any authorized ECONO-DEALER's place of business, to be applied as a credit against car rental. The ECONO-DEALER shall accept all such "due bills" as may be tendered, to be applied at their full face value against actual rental invoices. The ECONO-DEALER may then use such "due bills" so collected as cash at 50% of face value, to be applied against the ECONO-DEALER's monthly obligations to ECONO-CAR. In no event shall the ECONO-DEALER be obligated to sustain a net cost of more than \$300. per year in the redemption of such "due bills"; and accordingly, when and if this limit is exceeded, the remainder, if any, shall be redeemed by ECONO-CAR at full face value.

AGENCY:

The ECONO-DEALER is an independent contractor, and is in no sense a legal agent or officer of ECONO-CAR, and has no authority to bind ECONO-CAR in any manner whatsoever.

INDEMNITY:

The ECONO-DEALER shall indemnify ECONO-CAR and hold it harmless from any claims, demands, liabilities, actions, suits or proceedings asserted by third parties, and arising out of the ECONO-DEALER's business.

LOCAL CODES AND ORDINANCES:

The ECONO-DEALER shall be solely responsible for compliance with all local laws, orders, codes or ordinances applicable to the ECONO-DEALER's business.

ASSIGNMENT:

This agreement may not be assigned by the ECONO-DEALER without the prior consent, in writing, of ECONO-CAR, which consent shall not be unreasonably withheld. Consent is hereby given to the ECONO-DEALER, if an individual or partnership, to assign this agreement to a corporation in which the ECONO-DEALER holds at least fifty-one percent (51%) of the capital stock.

EXCLUSIVITY OF BUSINESS:

Neither the ECONO-DEALER nor the ECONO-DEALER's principals shall, directly or indirectly, during the term of this agreement or for a period of two years after the termination of the agreement, and within a radius of 50 miles of the territory herein granted, engage in any activity in competition with the business of ECONO-CAR, whether individually, or through a partnership or corporation.

WAIVER:

Failure by ECONO-CAR to enforce any of the provisions of this agreement shall not constitute a waiver of ECONO-CAR's rights or of the ECONO-DEALER's default, if any.

TERMINATION:

The ECONO-DEALER may terminate this agreement at any time by giving ECONO-CAR ninety (90) days notice in writing; such termination shall not relieve the ECONO-DEALER from any obligation that shall have matured hereunder or under any collateral written agreement of the parties. ECONO-CAR may terminate this agreement only upon the occurrence of any of the following conditions:

- A. If the ECONO-DEALER shall fail to meet any obligation provided for in this agreement, where such failure shall continue for ten (10) days or more following the mailing to the ECONO-DEALER of written notification of default.
- B. Where the ECONO-DEALER discontinues the active conduct of his business.
- C. Upon the transfer or assignment of any part of the ECONO-DEALER's business or assets, which results in the passage of control of the business, unless consented to in writing by ECONO-CAR.
- D. Upon the insolvency or bankruptcy of the ECONO-DEALER, voluntary or involuntary, the making of an assignment for benefit of creditors, appointment of a receiver or trustee of any part of the assets of the ECONO-DEALER's business, the service of a warrant of attachment upon any of the assets of the business or upon service of an execution.
- E. If the ECONO-DEALER shall breach any collateral written agreement between the parties.

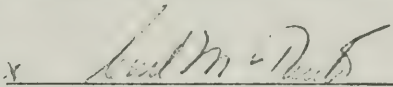
Upon termination of this agreement, the ECONO-DEALER shall return to ECONO-CAR, or effectively destroy, all literature, signs, advertising material, promotional matter, manuals and other materials identifying the former ECONO-DEALER with ECONO-CAR and shall immediately cease to refer to or identify himself or itself with ECONO-CAR or with any other trade name or symbol employed by ECONO-CAR. The ECONO-DEALER shall arrange for the cancellation of all telephone listings obtained in the ECONO-CAR name and shall release to ECONO-CAR or its designee all telephone numbers included in such listings. The ECONO-DEALER shall thereafter take no action detrimental to ECONO-CAR or the ECONO-CAR RENTAL SYSTEM.

MODIFICATION:

This agreement constitutes the entire agreement of the parties and may not be modified, except in writing, executed by an authorized officer of ECONO-CAR.

APPROVAL:

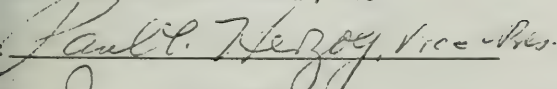
This agreement shall become effective upon its acceptance in Elizabeth, New Jersey by an authorized officer of ECONO-CAR. Approval shall be evidenced only by the execution of this agreement by such authorized officer and by the mailing to the ECONO-DEALER of an executed copy. This agreement shall be construed and enforced in accordance with the laws of the State of New Jersey, and nothing herein contained shall be construed as doing business in any other state. If any provision of this agreement in any way contravenes the laws of any state or jurisdiction, such provision shall be deemed not to be a part of this agreement in that jurisdiction, and the parties agree to remain bound by all remaining provisions. This agreement terminates and supercedes any prior agreement of the parties.



ECONO-DEALER-APPLICANT

CEPTED:

ECONO-CAR INTERNATIONAL, INC.



Paul C. Herzog, Vice Pres.
TE: June 28, 1965

SCHEDULE "A"
OF
THE ECONO-CAR RENTAL SYSTEM
ECONO-DEALERSHIP AGREEMENT

The following items are included in the new ECONO-DEALER's Set-Up Kit:

1. The ECONO-CAR OPERATIONS AND PROCEDURES MANUAL is the ECONO-DEALER's best friend. All facets of the ECONO-DEALER's operation are discussed in depth. All new ECONO-DEALERS are invited to attend THE ECONO-CAR TRAINING SCHOOL in Elizabeth, New Jersey. Here the ECONO-DEALER is taught the Auto Rental Business including the use of all forms and systems. The Operations and Procedures Manual serves as a constant reminder of the things learned at the TRAINING SCHOOL. Specially trained field representatives provide additional on the spot training and help.
2. CONSTANT HELPS pour out from the home office in the form of a Newsletter called THE ECONO-GRAM. This includes continuing announcements of new Advertising and Publicity which are constantly produced by our Advertising Department.
3. OPERATIONAL FORMS: Enough forms for the first 60 days operation are supplied free of charge. These include Car Rental Agreements, Qualification cards, Car Control cards, Condition Reports and many other ECONO-CAR forms used in the ECONO-DEALER's business.
4. SALES FORMS: These include letterheads and envelopes, display sheets, ad mats, post cards, table folders, dresser tents, banners, electric signs, reservation forms, etc., etc. The value of these sales items exceeds \$500.00.
5. ANNOUNCEMENT ADVERTISING: ECONO-CAR places and runs at its own expense ads in the new ECONO-DEALER's newspaper to prepare the area for the new ECONO-DEALER.
6. PUBLICITY: Publicity releases are made to the ECONO-DEALER's newspaper of the new ECONO-DEALERSHIP.

SCHEDULE "B"
OF
THE ECONO-CAR RENTAL SYSTEM
ECONO-DEALERSHIP AGREEMENT
THE ECONO-CAR LEASE PLAN

In consideration of the granting by ECONO-CAR of the exclusive ECONO-DEALERSHIP outlined in the agreement to which this schedule is attached, it is further agreed as follows:

1. ECONO-CAR does hereby extend to the ECONO-DEALER the full benefits of the ECONO-CAR LEASE PLAN. Specifically, the ECONO-DEALER may lease from ECONO-CAR new current model year CHRYSLER automobiles, for use in the daily rent-a-car business, at the following monthly rentals:

Two Door Valiant, Model V100	\$129.00
Four Door Valiant, Model V200	134.00
Four Door Dodge Dart	134.00
Four Door Plymouth Savoy	139.00
Four Door Dodge 300	142.00
Plymouth Convertible (V-8)	157.00
Plymouth Savoy Four Door Station Wagon	152.00
Four Door Chrysler Newport	162.00

2. The monthly rentals set forth above shall include the insurance coverage described in the ECONO-DEALERSHIP AGREEMENT, as well as all delivery and destination charges. All vehicles are to be equipped with automatic transmission, radio, heater, 2 seat belts, and left outside mirror. Each lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. A security deposit of \$100.00 per vehicle and the first month's rent in advance shall be paid to ECONO-CAR with each order. The monthly rentals do not include city, state or local taxes, if any, licensing or registration charges or fees or inspection fees, if any. The ECONO-DEALER shall execute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles.

3. The ECONO-DEALER does hereby place the following order, to be delivered immediately or as soon as such vehicles may be made available for delivery.

<u>3</u>	Two Door Valiants, Model V100
<u>3</u>	Four Door Valiants, Model V200
<u>2</u>	Four Door Plymouth Savoy Sedans

The ECONO-DEALER's check in the amount of \$ 2,345 (in addition to the franchise fee provided for in paragraph "2" of the ECONO-DEALERSHIP AGREEMENT), representing security deposits of \$100.00 per vehicle plus the first month's rent in advance on this order, is included with this order.

Dated June 28, 1963

x Leah M. Rente


By _____

Accepted:

ECONO-CAR INTERNATIONAL INC.

by Paul C. Herzog, Vice Pres

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


GEORGE C. DALTHORP
Attorney

MAY 20 1968

**United States Court of Appeals
for the Ninth Circuit**

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

Brief of Appellant Carl M. Taute

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BILLINGS TIMES PRINT

FILED

Filed, 1968

APR 15 1968

....., Clerk

WM. B. LUCK, CLERK

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(b) Statement of the Pleadings and Facts Disclosing Federal Jurisdiction.

Appeal from the United States District Court for the District of Montana, Billings Division.

The District Court had and has jurisdiction of the cause by removal proceedings. Plaintiff originally filed his complaint in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone. Defendant removed the cause to the said District Court by timely Petition for Removal and Undertaking for Costs, each duly served, pursuant to Title 28, Sec. 1446, U.S.C.A. The cause was properly removable because it is one of which the said District Court would have had original jurisdiction (Title 28, Sec. 1441(a), U.S.C.A.).

Said Federal District Court has original jurisdiction of the cause by reason of the diversity of citizenship between plaintiff and defendant and because the amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs (Title 28, Sec. 1332, U.S.C.A.).

Judgment in the cause, based upon jury verdict, was made and entered on August 16, 1967, in favor of the plaintiff in the sum of \$1,052.00 on the first cause of action, and \$6,000.00 on the second cause of action, for a total of \$7,052.00.

Taute timely made and served a Motion for New Trial as to the first claim in his complaint (Rule 59, Rules of Civil Procedure). Econ-Car also timely made and served its Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

Both motions for a new trial were by the Court denied on September 18, 1967. Thereafter, within thirty days Econo-Car served a Notice of Appeal to this Circuit Court of Appeals (Rule 73(a)). Thereafter, within 14 days, to-wit, on October 23, 1967, the Appellant Taute served and filed his Notice of Appeal pursuant to 73(a)(3), Rules of Civil Procedure.

Accordingly both the Federal District Court from which this appeal is taken, and this Appellate Court, had and have jurisdiction in the premises.

(c) Statement of the Case

Econo-Car International, Inc., the defendant named in the original action, is a corporation organized and existing under the laws of the State of New Jersey.

Carl M. Taute, the plaintiff in the original action, is and was at all times pertinent a citizen of the United States, resident of the State of Montana.

In the month of June of 1963, Econo-Car was engaged in the business of car rentals, and for the purpose of promoting itself as a national organization, was offering to persons who were willing to participate, certain franchise agreements whereby the franchisee would rent cars in a certain locality or localities under the name and aegis of Econo-Car Rental System.

Taute, who resided in Billings, Montana, got involved with Econo-Car when he answered an advertisement in a local paper which offered a franchise of a discount type rental operation built on the use of Chrysler automobile products (Tr. 5). Within two or three weeks after he answered the advertisement he received a telephone call from a gentleman who identified himself as an Econo-Car representative and asked for an appointment to meet

with Taute and his wife, Rayetta.

At that time Taute was merchandising manager and director of retail operations for Ryan Grocery Company in Billings (Tr. 26).

As a result of the phone call Taute and his wife met with a Mr. Burko, who represented himself as an Econo-Car representative responding to Taute's letter in answer to the ad (Tr. 27). They met in the Esquire Motel in Billings and there Mr. Burko had with him a Mr. Alvarez, whom Mr. Burko introduced as being on the national sales staff of Econo-Car, being trained for a sales position. (Tr. 28)

Mr. Burko explained to the Tautes that Billings had been chosen as one of the towns that could support a car rental operation. Using a blackboard he demonstrated to the Tautes how they could make a profit on a 15 car operation in Billings, using their method, their tools, their resources, and following the general instructions to be supplied by Econo-Car (Tr. 29).

After some other discussion at this first meeting in the Esquire Motel, Burko produced a blank form of contract entitled "Econo Dealer Appointment Program and Agreement" which is the same as Exhibit 6 in this action. He suggested that the Tautes take the agreement home with them to study it and return in a few days. He also gave them names of two or three dealers with whom they might verify whether Econo-Car was doing the things that Econo-Car claimed. No contract was made by Taute with these persons (Tr. 33).

Two or three days later Taute and his wife received a phone call from Mr. Burko, and again a meeting at the Esquire Motel was arranged. The same persons attended the meeting, Mr.

Taute, his wife, Mr. Burko and Mr. Alvarez.

Taute brought with him to this second meeting the blank agreement and the list of questions concerning the various clauses in the contract. They then proceeded to take the contract item by item. The Tautes asked questions and Burko answered them for them. (Tr. 34)

We will not burden this Court with a recitation of what happened in that conversation, the representations that were made, and the statements that were made by Mr. Burko to induce Taute to sign the contract which became Exhibit 6. Since Econo-Car is also appealing in this action we expect that we will be called upon to make a statement with respect to that conversation in our responsive brief to Econo-Car and no useful purpose would be served in repeating that conversation here. It is enough to say that eventually the jury determined that Econo-Car, through Mr. Burko, had made representations to Taute which turned out to be false and awarded him a verdict on the second claim, which related to those false representations.

Taute's first claim in this action relates to the breaches of the contract, Exhibit 6, and the related instruments thereafter executed, which resulted in damage to Taute above and beyond the damages he sustained by reason of the fraudulent deceit of Econo-Car. We will concern ourselves with those breaches in this statement of the case.

When Taute was induced by the deceit of Econo-Car to sign Exhibit 6, he nevertheless thought that the contract itself would be performed by Econo-Car. Experience proved this to be untrue. Taute contends, and the evidence sustains him, that Econo-Car breached every important provision of Exhibit 6 and

the supporting lease, Exhibit 7, in such manner as to prevent Taute from continuing in the business, and to drive him out of it, because he had no agreement with Econo-Car upon which he could rely for the continuation of the rental car business in Billings. The following are some examples:

(1) Number of Months for Which Taute Could Lease Individual Cars:

In Schedule B of Exhibit 6, it is provided in paragraph 2:

"* * * Each lease shall run for a minimum period of twelve months to a maximum of eighteen months* * *. The ECONO-DEALER shall execute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles."

Taute understood from this language that the option would be given to him as to how many months past the minimum period he would be allowed to rent the automobile. However, in August of 1963, he signed Exhibit 7, which is dated July 10, 1963, which provides the option in the Lessor (Econo-Car) as follows:

"The term of this lease is for a period of eighteen months from the date of delivery (see attached rider) of the vehicle to Lessee, except that Lessor shall have the absolute right, in its sole discretion, to terminate the lease at any time following the twelfth month, provided that Lessor makes available to Lessee a similar replacement vehicle of the then current model year, for a like term of eighteen months, and at an identical rental* * *."

Thus by Exhibit 7, which was not displayed to Taute when he executed the franchise agreement, it was agreed between the parties that the option as to the number of months after twelve months for each vehicle would remain in Econo-Car. However, Exhibit 7 provided for a minimum of twelve months for each automobile and it further provided that replacements would be made on termination of another vehicle for eighteen months.

These contractual provisions were important to Taute because of the property tax situation on automobiles in the State of Montana. New cars are not subject to property taxes, in the first year or year of purchase. Thus a new car brought into Montana in 1963 is not subjected to property taxes until February 15 of the subsequent year, 1964. Knowing this, Taute wanted to arrange his rental fleet so as to be able to bring in new cars for his rental operation before February 15 of each year. This would mean a saving of about \$40 per automobile per year; on a ten car fleet, the saving would be substantial.

Taute's original fleet of ten cars were delivered to him by Econo-Car in the month of October and November of 1963. It was Taute's plan to license them of course for 1963 at the cheap no property tax rate; then license them for 1964, paying the property taxes; and then trade them in to Econo-Car between January 1 and January 15, 1965, so that he would avoid property taxes on the used cars and would not have to pay property taxes on the replacements under the Montana tax laws. He was prevented, however, from executing this plan because Econo-Car unilaterally changed the leasing terms on the number of months he could hold the cars.

Thus in November, 1963, Taute received a "rate revision"

(Exhibit 9, sheet 3) which provided that effective December 1, 1963,

"All 1964 automobiles will be available on a twelve month leasing term (instead of the previous eighteen). Either party may, however, extend the term for up to two months* * *."

The so-called rate revision was put into force by Econo-Car unilaterally. Taute was not asked to consent. Taute could have lived with this provision, however, because he had an option to extend to two months. Econo-Car, however, did not stand by this provision. On September 29, 1964, when he had the vehicles in his fleet less than a year, he was told that Econo-Car would pick up three of his automobiles.

On October 5, 1964 (Exhibit 10) he was notified by Econo-Car that all 1965 automobiles would be delivered to him on a six month lease term, which could be extended by Chrysler leasing without Taute's consent, of one month. Since 1965 automobiles were to be replacement for 1964, Exhibit 10 was in direct contravention of Exhibit 7 which provided that leasing terms for replacement vehicles would be eighteen months in duration.

Taute brought the situation to the attention of Econo-Car (Exhibit 11, sheet 3). He informed them of the taxing situation and of the desire to trade his cars in in the month of January, 1965. He was given no assurance on this particular. Econo-Car entirely disregarded the replacement provisions of Exhibit 7, the leasing agreement between them.

(2) The Provision for Insurance:

Obviously collision and liability insurance are of

vital consideration to a person in the case of a rental car business.

Paragraph 4E of the franchise agreement, Exhibit 6, provided:

"Econo-Car, in consideration of the payments, will provide collision insurance 'with no more than \$100 deductible' and physical damage insurance, including fire and theft and combined additional coverages with \$50 per loss deductible."

Under the franchise agreement the insurance was to be provided at no additional cost to Taute.

Yet, on December 26, 1963, Econo-Car unilaterally added \$5.00 per month per car to the payments to be made by Taute, for insurance (Pl. Exh. 13). Then on September 2, 1964 (Exh. 13, sheet 2) Econo-Car informed Taute that they were changing the collision insurance coverage from \$100 deductible to \$250 deductible. This had the effect of increasing Taute's risk on the automobiles in his fleet from \$1,000 to \$2,500 with the automobiles that he had on the road.

Taute addressed a letter to Econo-Car (Exh. 14) asking if the \$250 deductible collision coverage was mandatory. Taute was emphatically informed by Econo-Car that it was mandatory (Exh. 14, sheet 2).

(3) Turn-in Costs for Vehicles:

Another important element of the leasing agreements was the turn-in cost that was to be assessed Taute for wear and tear on the leased vehicles.

Under the franchise agreement nothing was stated in Schedule B of Exhibit 6 with respect to turn-in costs. However,

that agreement did say that a "standard form agreement would be executed before the delivery of any car."

The lease form which was executed between the parties is Exhibit 7. Paragraph 11 of that agreement provided:

"Upon the expiration of this lease,
* * *, Lessee shall deliver to Lessor or
its designee the vehicle, including five
(5) usable tires, as well as any extra
equipment of the vehicle* * * and is as
good condition as when delivered, ordinary
wear and tear and bona fide rent-a-car
business excepted* * *. Tire costs shall
be restricted to bald or missing tires."

Thus the provisions of Exhibit 7 confirmed Taute's understanding, to-wit, that ordinary wear and tear were not his responsibility and that he would not receive charges for tires unless they were bald or missing. His understanding was confirmed by Exhibit 8, apparently provided by Chrysler Leasing Corporation with respect to inspection of leased vehicles. In that exhibit ordinary stone chips, bumps or scratches or minor dents would be excepted, and tire wear would not be considered a lessee responsibility unless it was evident he had failed to maintain proper alignment of the front wheels.

When Taute turned in his first automobiles, at the request of the Lessor, he was assessed for charges on the condition of the automobiles that were not within the leasing agreement. He protested to Econo-Car (Exhibit 12) and the matter was satisfactorily taken care of for Taute. However, again unilaterally, Econo-Car proposed changes in the lease terms with

respect to turn-in conditions (Exh. 16). Again these changes were unilateral and in contravention of the provisions of Exhibit 7.

(4) Advertising:

Again it is obvious that advertising is an important part of the rental car business. Provision was made for advertising in the franchise agreement.

Paragraph 4F of the franchise agreement provided that Econo-Car would pay each dealer, in this case Taute, an advertising allowance of \$7.50 per month per automobile operated by him provided that Taute advertise locally a minimum amount of \$15.00 per car. Having Taute handle the advertising on a local basis was advantageous because they avoided national advertising rates in that manner.

The advertising arrangement went through a variety of changes, all unilaterally instituted by Econo-Car.

In Exhibit 15 Taute was called upon to handle the advertising through an advertising agency selected by Econo-Car, though the advertising would still be on a local basis.

On August 31 (Pl. Exh. 18) Econo-Car postponed all advertising for the entire month of September. On November 4, 1964, Taute received Plaintiff's Exhibit 20, which informed him that Econo-Car was instituting a 25% reduction in costs, including its advertising schedule, and that it would advertise only on 75% of Taute's fleet, in effect cutting down the Econo-Car budget from 10 cars to 7½ cars. This had the effect of reducing the advertising by 25% per month.

Taute felt that the reduced advertising was affecting his business and requested additional advertising subsidy from Econo-Car, but was refused. Eventually the company went back to

its original advertising deal, but after Taute had submitted his letter terminating the contract and franchise agreement.

THE FOREGOING examples are given to show that the franchise agreement, Exhibit 6, and the lease agreement for automobiles Exhibit 7, had no real meaning to Econo-Car, and it changed the provisions of those agreements whenever it felt inclined. Taute in the meantime was struggling to make his rental car operation in Billings a success. He perceived that a substantial source of rental car business would be from persons using the Billings airport, and accordingly made arrangements to bid, and did bid successfully on a location in the airport terminal in Billings. Before he effectuated the lease for the airport facilities, however, Econo-Car was undergoing such drastic changes in its method of operation in the fall of 1964 that it became apparent to Taute that he could not rely on any of the provisions of his franchise agreement or the leasing agreement, and that he really had no definite contract, as far as Econo-Car was concerned, which would tell him where he stood with respect to the future in the rental car business. Cost after cost was being passed on to Taute by Econo-Car and with each additional cost his margin for success was being substantially reduced. So it was then when Econo-Car proposed to change the turn-in provisions so as to increase the cost to Taute he determined that it was the straw that broke the camel's back and served his letter of termination of the franchise agreement (Exh. 21). Taute illustrated his difficulty, using a Valiant automobile as an example (Tr. 105, et seq.) and set forth his difficulty:

"Q. Now then, with respect to the time when you were coming up to the point where you were

going to -- where you decided you had to eliminate or get out of this business, what additional costs were you facing now with respect to this Valiant?

A. I was facing increased costs in the area of tires; increased costs in the area of car condition at turn-in time; increased costs of maintaining more expensive equipment than I had originally bargained for; increased tax cost on this more expensive equipment and-- let's see there was --

Q. Well, you had the problem about the deductible, did you not?

A. And increased costs in the event of an accident."

(Tr. 108, Lines 10-18)

Taute was in the car rental business for Econo-Car from October 23, 1963, until February 15, 1965. In this period of time he ran the business entirely, devoting many hours per day to it. He had the managerial responsibility, the promotional responsibility, the advertising responsibility, the collection work, the contract negotiations and the dealing with Econo-Car. He delivered cars, washed cars, and made minor repairs. His wife worked with him in the business (Tr. 113).

In the time that Mr. Taute was involved with the dealership, he sustained an operating loss of \$2,521.56; and he contributed \$8,934.00 in investment, not considering the franchise costs, to the venture (Tr. 124). In addition, at the time that he signed the franchise agreement, his employment with Ryan

Grocery showed him capable of earning the sum of \$15,000 per year.

These are the sums that Taute lost; yet, under the instructions of the Court the jury was so limited that it could bring in nothing more than \$1,052.00 on Taute's claim in his favor. Manifestly this result is unjust.

(d) Specifications of Errors

1. The trial court erred in instructing the jury as follows:

"Now with respect to the breach of contract, the plaintiff says that the contract, as explained by the evidence which was introduced, was violated by the defendant, and he complains in these respects: One, that the provision of the contract with respect to advertising were violated; two, that the provisions of the contract with respect to insurance were violated, and, three, that the defendant changed the leasing agreement for the automobiles to be used by the plaintiff and thereby increased the cost to the plaintiff.

"The plaintiff has failed to prove that the advertising agreements were not honored, and therefore he may recover no damages on that account.

"With respect to the change in the insurance program you are instructed that it was the duty of the defendant to provide, without charge, collision insurance with one hundred dollar deductible. And I am satisfied that you know

what a deductible policy is. Simply means that in the event of a collision and damage the insurance company does not pay the first hundred dollars. Now, unless you find that the defendant proposed an insurance change to which the plaintiff consented, and this could be proved by an oral agreement, as well as by letters or writings, then you may award the plaintiff the damage which he sustained. This damage would be measured by the premium charged for the months it was charged, plus the difference between the value of a collision policy with a one hundred dollar deductible clause and a policy with a two hundred fifty dollar deductible charge. This again spread over the months that the two hundred fifty dollar deductible policy was in force prior to the termination of the contract which was on February 15, 1965.

"With respect to the claimed breach of the leasing agreement, in this connection I instruct you that unless the plaintiff proposed a change to which the defendant agreed, then it was the duty of the defendant to provide automobiles to the plaintiff for a period of eighteen months after the initial dates of delivery. In this connection nine cars were delivered on October 23, 1963, and one car on November 1, 1963. Now, if you find that by reason of the

changes in the lease terms, and specifically I refer to the length of the term of leasing or the turn-back provisions, and again I instruct you that it is necessary that these changes be not consented to by the plaintiff, and if you find that he suffered damages, then you may award him such damage as you may find from the evidence that he did suffer. In this connection, however, I should advise you that the defendant's obligations under exhibit six and seven expired within a few days of April 30, 1965, and so any change in leasing arrangements wouldn't be -- you couldn't consider any damages based upon a projection beyond that time."

(Tr. 283, Lines 1-25;
284, Lines 1-22 inc.)

To which the plaintiff made objections as follows:

"With respect to Instruction Number Two. That portion thereof which states that the plaintiff is not entitled to recover because the advertising agreements were not honored is not true and is not founded on the evidence. There being evidence that there were months in which no advertising was performed and other months in which it was performed in a manner different than the contract. And again an invasion of the province of the jury with respect to that particular portion. That

there is no evidence upon which the jury can determine the difference in value between the collision policy and one hundred dollar deductible and one of two hundred fifty dollar deductible.

"That the third portion of the Court's Instruction Number Two relating to the change in the leasing agreement does not take into account the fact that under exhibit seven, if it were a valid, modified contract existing between the parties, would require the replacement vehicles to be of eighteen months term, and that the position the plaintiff found himself in on November 15, 1965, was that despite the provisions of exhibit seven the vehicles were coming to him on a six month term on an agreement which -- under an arrangement to which he had not consented. That the proposed instruction does not take into account the fact that the plaintiff in this case, Mr. Taute, at the time he terminated the arrangement was faced with a situation of accumulations in the leasing agreement were such that all taken together they were so material and interdependent as to constitute a violation of the whole contract by Econo-Car that he had a right then to recover for the breach of the whole contract and not simply limited as the Court's Instruction Number Two limits him to

damages for breaches, for particular breaches of the contract. That instruction, again, is not the proper instruction on the measure of damages as far as breach of the contract is concerned, because he was entitled to recover all of the loss to which he has been put under -- is entitled to recover such amount that would compensate him for all of the detriment approximately caused by the whole breach of the contract by Econo-Car, and the jury is not so instructed. As such the Court is not instructing the jury on plaintiff's theory of the case, or is instructing it in an incomplete and insufficient manner and is invading the province of the jury with respect to the right of recovery in the case."

(Tr., 272, Lines 4-25;
273, Lines 1-19 inc.)

And to the further objection of the plaintiff as follows:

"Also object to the failure of the Court to instruct on the element of damage on out-of-pocket rule, and asks the Court to so instruct the jury.

"Object to the statement that the obligations of the defendant expired on April 30, 1965, for the reason that it ignores the

eighteen month replacement provision in
exhibit seven."

(Tr., 285, Lines 24-25;
286, Lines 1-5 inc.)

2. The Court erred in failing to give Plaintiff's
Offered Instruction No. 13, after a request therefor by the
plaintiff, in words and figures as follows:

"You are instructed that the measure of
damages for a breach of contract is such
amount as will compensate the party aggrieved
for all of the detriment proximately caused
thereby, or which in the ordinary course of
things would be likely to result therefrom."

3. The Court erred in failing to give Plaintiff's
Offered Instruction No. 16, in words and figures as follows:

"In determining the amount of damages, if
you find from a preponderance of the evidence
and under these instructions that Taute is en-
titled to a verdict, you should consider, allow
for, and make just compensation for the moneys,
if any, laid out and expended by him as capital
contributions to or expenses incurred for the
operation by him of the Econo-Car business,
less any value accruing to Taute from such
operation or business.

"You should also consider, allow for and
make just compensation for the reasonable value
of the services and time expended by him in
the operation of the Econo-Car business which

you find from a preponderance of the evidence was brought about by the misrepresentations of the defendant or by breaches of contract, if any, by Econo-Car.

"If you find from the evidence that after Taute brought the operation of the Billings Econo-Car business to a halt he was thereafter forced to undergo a period of enforced idleness which was proximately caused by the actions or omissions of the defendant Econo-Car under the evidence and instructions in this case, you should award him the reasonable value for the earnings he might reasonably be expected to earn otherwise during such period of enforced idleness.

"The amount sued for in the complaint should not be taken by you to be a criterion of the amount of your verdict for the plaintiff. You should set your award, if any, in the full amount that you find from a preponderance of the evidence, but in no event shall your award exceed the sum of \$_____, the amount sued for in this action."

4. The Court erred in failing to give Plaintiff's

Offered Instruction No. 12, after request therefor by the plaintiff, in words and figures as follows:

"If you find from a preponderance of the evidence that Taute was induced to enter into

the contractual relationship with Econo-Car by virtue of the misrepresentations, if any, of Mr. Burko and Mr. Alvarez, then Taute, under the law, had the right to elect to continue performance of the remainder of the contract on his part, and he is not thereby deprived of his right to recover from Econo-Car for the damages, if any, which were proximately caused him by such misrepresentations. Such an election to continue the contract by Taute would have the effect of requiring both parties to perform the conditions required of them under the remainder of the contract. Thereafter, if Econo-Car were guilty of further breaches of the contract, and you find from a preponderance of the evidence that such breaches, though not so large by themselves, when taken together were so material and interdependent as to constitute a violation of the whole contract by Econo-Car, then Taute had the right to treat the whole contract as breached, and to recover from Econo-Car such damages as the law allows."

5. The Court erred in entering its Order dated September 18, 1967, denying plaintiff's Motion for a New Trial as to the First Claim.

6. The Court erred in refusing Plaintiff's Offer of Proof Number Two, in words and figures as follows:

"MR. SHEEHY: This is offer of proof number two, Plaintiff's Offer of Proof Number Two.

"Comes now the plaintiff and offers to prove by the witness, Carl Taute, now on the stand, and if allowed to testify his testimony would prove that in Billings at the Esquire Motel in the month of June of 1963, in the presence of Mr. Alvarez and in the presence of Carl Taute and Mrs. Taute, Mr. Burko projected for Mr. Taute the income that he might be able to expect from the operation of a franchise arrangement under the Econo-Car System in Billings such as was being proposed to Mr. Taute at that time, that the projection for a fifteen car operation was the sum of one thousand dollars per month per car, and that for a ten car operation the income per month per car would be somewhat less, but that he might expect to build to a thousand dollars per month in short order, in words to that effect; that this statement was made unsolicited by Mr. Taute; was made for the purpose of explaining to him what the possibilities were as to income under this arrangement, and as part of the whole conversation which led to the conversations-- I should say which led to the signing of the

contract on or about June 28, 1963. And we so offer this testimony in evidence.

"THE COURT: Do you have any objections to that offer of proof?

"MR. DALTHORP: Yes, Your Honor; first one being that it is outside of the scope of the pleadings. Secondly, that it is pure dealers' talk in the selling of a franchise. Third, that it is offered to vary the terms of a written contract, and forth, that it is a promise as to future events which, if at all, was made prior to the execution of a written contract purporting to combine all of the agreements of the parties and actually, I don't think, even as stated, that it was in the terms of a promise, but a general representation.

"THE COURT: The objections are sustained."

(Tr. 120, Lines 22-25;
121, Lines 1-25; 122,
Lines 1-5 inc.)

(e) Argument of the Case

SUMMARY:

The jury by its decision found that Econo-Car had breached the franchise agreement in several respects. The jury awarded all the damages it could award under the limited instructions of the Court.

The Court's instructions prevented Taute from recovering a proper measure of damages for the breach of the contract in this case.

The franchise agreement provided that it was to be construed and enforced according to New Jersey law. New Jersey follows the common law rule that recoverable damages for breach of contract are such as may reasonably be supposed to be in the contemplation of the parties at the time they made the contract. New Jersey allows as a measure of damages for breach of contract such amount as will compensate the party aggrieved for all the detriment proximately caused by the breach, or which in the ordinary course of things would be likely to result therefrom.

The evidence showed the plaintiff to be out-of-pocket under the franchise agreement the following amounts:

Contributions to capital	\$8,934.00
Operating Loss	<u>2,521.56</u>
Total	\$11,455.56

The foregoing total does not include the \$6,000.00 Taute paid as a franchise fee, nor does it include anything for the reasonable value of his services in the time that he was employed in trying to make the franchise work.

The several breaches of contract by Econo-Car were such as to make the whole franchise agreement wholly impossible

to Taute, and to prevent his performance of the franchise agreement.

The Court by its instruction limited damages for breaches and the small dollar amounts flowing out of those breaches, without regard for the fact that the breaches collectively, and interdependently, had a cumulative effect of breaching the whole contract.

The result is that the plaintiff Taute is unjustly and inadequately compensated for the damages which he sustained by virtue of Econo-Car's breaches. The decision on the First Claim should be reversed and sent back for a new trial on the issue of damages.

ARGUMENT:

Plaintiff Taute filed his complaint against Econo-Car alleging two claims for recovery, one based upon fraudulent inducement to enter the franchise agreement, and the second for breaches of the franchise agreement by Econo-Car which damaged him.

The Court submitted both claims to the trial jury for decision. The jury found that Econo-Car was indeed guilty of fraudulent representations in inducing Taute to enter into the franchise agreement and awarded Taute \$6,000.00 on that claim, the limit fixed by the Court.

The trial jury also brought in its verdict of \$1,052.00. Thus the jury also found that Econo-Car was indeed guilty of breaches of the contract into which it had fraudulently led Taute. The jury, however, by the court's instructions, were limited to small dollar amounts because the court made the several breaches independent instead of interdependent. The court ignored the

cumulative effect of the breaches and the fact that they forced Taute out of his franchise agreement. The jury in effect awarded everything it could award under the court's instructions on the second claim.

The Court's position ignored the fact that the continuing and respective breaches of the contract had put Taute in the position where he could not go forward with the franchise arrangement. Taute's testimony is clear on this point:

"Q. Now then with respect to the time when you were coming up to the point where you were going to -- where you decided you had to eliminate or get out of this business, what additional costs were you facing now with respect to this Valiant?

A. I was facing increased costs in the area of tires; increased costs in the area of car condition at turn-in time; increased costs of maintaining more expensive equipment than I had originally bargained for; increased tax cost on this more expensive equipment, and let's see there was --

Q. Well you had the problem about the deductible, did you not?

A. And increased insurance costs in the event of an accident.

Q. Now the price you were paying for the Valiant was a hundred fifteen fifty at this time as compared to a hundred twenty-nine dollars?

A. Yes.

Q. Did that price itself have any compelling effect on you with respect to continue staying in the business?

A. No, I didn't feel that it was enough to justify the increased risks we were taking -- enough of a reduction.

Q. Did you then eventually decide to terminate your relationship with Econo-Car?

A. Yes."

(Tr. 108, Lines 6-25;
109, Lines 1-4)

A good example is the Court's charge with respect to the changes in insurance. The Court charged the jury in the instruction to which we have objected, that the damage for the insurance changes would be "measured by the premium charged for the month it was charged plus the difference between the value of a collision policy with \$100 deductible and a policy with \$250 deductible charge." (Tr. 283, 284) The Court limited damages on this item to the termination of the contract on February 15, 1965 (Tr. 284).

Thus in its charge, under the evidence the jury could award to Taute a small dollar amount, amounting to approximately \$5.00 per month from December 26, 1963 (Pl. Exh. 13) to February 15, 1965, the date of the termination of the contract, a period of something over fourteen months.

Would such a sum adequately compensate Taute for the damage done to him by virtue of the breach of the insurance covenants and the franchise agreement? Obviously not. The increase in dollar cost was not the real damage to him; it was the increase

risk that he was facing with every car that he placed on the road in the rental market. Where formerly he was at risk for \$100 for each car, that risk increased to \$250 for each car. On his ten car fleet it meant that he had a possible \$2,500 of risk for accidents on his rental cars as opposed to a \$1,000 possibility. As a businessman, Taute had to make a determination whether he could afford to take the risk of losing that additional money any time an accident occurred to any car. Awarding him the difference in premium between a \$100 deductible and a \$250 deductible policy does not adequately remedy the breach. The breach of the insurance contract had the effect of making Taute's continued operation of the franchise a quite risky matter to him. In Exhibit 6 Econo-Car had agreed to provide him with \$100 deductible collision insurance cost-free to Taute. Instead it was supplying him with a \$250 deductible insurance policy at a cost of \$60.00 per year per car additional to Taute. The breach was not only material to the premium cost to Taute; it was material to the whole franchise agreement. Yet, the Court's instructions prevented him from making a recovery against the defendant for all of the damages he suffered by virtue of the breach of the whole franchise agreement.

A second breach of the franchise agreement which materially affected the whole franchise as far as Taute was concerned was the number of months that he could depend on for having each individual car in his possession.

The only agreement affecting the length of time that the cars were to be in the possession of Taute was Exhibit 7, the lease agreement. Under the caption "Term" that agreement provided:

"2. The term of this lease is for a period of eighteen (18) months from the date of delivery SEE ATTACHED RIDER of the vehicle to the Lessee, except the Lessor shall have the absolute right, in its sole discretion, to terminate the lease at any time following the twelfth month, provided that Lessor makes available to Lessee a similar replacement vehicle of the then current model year for a like term of eighteen months, and at an identical rental* * *."

Exhibit 7 was in full force and effect between the parties. Its provisions were never amended or rescinded by the mutual consent of both parties. However, its provisions were totally ignored by Econo-Car. Yet this is the only agreement between the parties under which Econo-Car made delivery of automobiles to Taute.

It is clear from the provisions of Exhibit 7 above quoted that Econo-Car could not terminate the lease of any car within the twelve month period after delivery; it is further clear that between the twelfth month and the eighteenth month it could so terminate the term as to any individual car but it had to make available to Lessee a similar replacement vehicle of the then current model year for a term of eighteen months and at identical rental.

Thus Econo-Car's agreement was to provide each vehicle for at least twelve months; its further agreement was that if it took the vehicles between the twelfth and the eighteenth month it would provide a similar vehicle at identical rental for an addi-

tional eighteen months.

No other reading of the lease term is possible without doing violence to the language of the instrument between the parties, Exhibit 7.

Yet the Court, in the instruction to which Taute has objected, told the jury that Econo-Car's obligations under Exhibits 6 and 7 expired within a few days of April 30, 1965. Manifestly this date was incorrect. The Court in its charge correctly stated that nine cars were delivered to Taute on October 23, 1963, and one car on November 1, 1963 (Tr. 284). Under the express terms of Exhibit 7 if Econo-Car intended to pick up the automobiles after one year, that is, after October 23, 1964, it would have to provide Taute with an identical car under identical terms for an additional eighteen months. None of this was done. The additional eighteen month period would have carried over until April of 1966, a year later than the Court's instruction provided.

Under Schedule B attached to Exhibit 6, in paragraph 2 of that schedule, it was set forth as an essential part of the franchise agreement that "each lease shall run for a minimum period of twelve (12) months to a maximum of eighteen (18) months. Under Exhibit 6, therefore, any lease offered to Taute should have been for a minimum twelve months with a maximum of eighteen months. What did Econo-Car do in this connection? The record is replete with Econo-Car's proposals to Taute for leases on a six month basis on a take-it-or-leave-it basis (Exhibit 10; sheet 3, Exhibit 9; sheet 2, Exhibit 11; Exhibit 16); and moreover, at no time did Econo-Car recognize any obligation to Taute to replace his vehicles with identical vehicles for an eighteen

month term under Exhibit 7.

These were important matters to Taute. Under the Montana taxing laws if a car is licensed in December it must be re-licensed again in January or February, and at the second licensing a personal property tax is collected. It meant the difference of about \$40 per car per year on the more expensive cars (Tr. 58,59).

Taute wanted to arrange the scheduling of the replacement vehicles so that he could take advantage of the tax laws and save the property tax on each car. If an arrangement could be made so that he would get new cars between January 1 and February 15 in each year, he would have to pay only a new car tax on each vehicle and avoid the property taxes when re-licensing time came around the following year.

It is obvious under the evidence that the provision for the lease term in Exhibit 7 and in Exhibit 6 meant nothing to Econo-Car. It did not feel bound by any provision requiring a twelve to eighteen month lease for each individual car. The matter of this breach of course was material to the whole contract as far as Taute was concerned. Yet, under the instruction of the Court no damage on this item could be found for Taute. Certainly, if any provision was material to the franchise agreement, the lease term on the rented automobiles was a material provision. It went to the heart of the contract. The trial court did not recognize this, however, and did not agree that a breach of the lease term provisions might constitute a breach of the whole contract and entitle Taute to all of the out-of-pocket damages that he sustained by virtue of such breach of whole contract.

What we have said with respect to the lease term

provisions of Exhibit 6 and Exhibit 7, also pertains to the turn-in provisions of those instruments. We speak now of the cost that would be accruing to Taute on damages to rental vehicles for which he might be assessed at the termination of the lease, when the individual vehicles were returned to the lessor, Econo-Car. (There is much reference in the evidence to Chrysler Leasing. Apparently Econo-Car had an arrangement with Chrysler Leasing under which it got automobiles and supplied them to its franchisees. Chrysler Leasing was blamed for much of the difficulty that Taute was facing with respect to turn-in provisions and other provisions of this contract. That, however, was not Taute's problem; it belonged exclusively to Econo-Car).

Under the original turn-in provisions of Exhibit 7 (paragraph 11, Exhibit 7) Taute was not to be assessed for any condition of the returned vehicle due to ordinary wear and tear and he would be assessed for tires only if they were bald or missing. We have already set forth for the Court in pages 8, 9 and 10 of this Brief how substantially those provisions were ignored and changed by Econo-Car. It is enough to say at this juncture that as far as the contractual provisions of Exhibits 6 and 7 were concerned, Taute stood on shifting sands. He had no way of prognosticating what his turn-in costs were going to be. He knew from his experience with the car that he had turned in that he would be assessed for costs not properly belonging to him. His margin of safety in doing business was being substantially reduced. Here again there was a breach of the contractual franchise arrangement which had the effect of driving him out of business. But under the Court's instruction on breach of contract, Taute could recover nothing for this most substantial breach

This case was tried in Montana where ordinarily the Federal Court, under Erie, would apply the Montana law. However, the franchise agreement, Exhibit 6, provided in paragraph 15 thereof, that "this agreement shall be construed and enforced in accordance with the laws of the State of New Jersey* * *."

There is, however, no substantial difference between the damages under New Jersey law for a breach of contract, and that of the State of Montana.

Montana has a statutory provision which says:

"17-301. (8667) Measure of Damages for Breach of Contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things would be likely to result therefrom."

Sec. 17-301, Revised Codes
of Montana, 1947.

Taute offered the Court an instruction (Plaintiff's Offered Instruction No. 16) expressly phrased in the language of this statute. The court refused to give it (Specification of Error No. 2, page 18 of this Brief).

The New Jersey law supports the proposed instruction. In Patco Products v. Wilson (N. J., 1950), 76 A.2d 677, 679, it was stated:

"* * * Thus was the defendant's breach accentuated and emphasis given to the common law rule that the recoverable damages are such as may reasonably be supposed to be in the contemplation of the parties at the time they made the contract (citing cases)* * *."

And in Apex Metal Stamp Co. v. Alexander & Sawyer, Inc. (N. J. 1957) 138 A.2d 568, 571, the New Jersey court said:

"The defendant's argument that plaintiff's damages were uncertain and insufficient so as to preclude an award is without merit. In discussing this question it is necessary to distinguish between uncertainty as to the fact of damage and uncertainty as to its amount. See 5 Williston, Contracts (Revised Edition 1937) Sec. 1346, page 3778; 5 Corbin, Contracts (1951), Sec. 1022, page 119; Restatement, Contracts, Sec. 331(1), page 515, comment (a) (1932); Annotation 'Uncertainty as to Damages' 78 ALR 858 (1932). The facts in the instant case clearly establish that damage did result; the amount of the loss may be calculated with reasonable certainty, though not precisely. Where it is certain that damage has resulted and the evidence affords a basis for estimating the damage with some degree of certainty, recovery is allowed (citing cases)."

Furthermore in New Jersey, where a plaintiff was prevented from performing his part of a contract through the fault of the defendant, the New Jersey court allowed recovery of damages. The case involved ^{AN ACTION} ~~a contract~~ against a municipality for work done and materials furnished under a contract, but the principle is the same. That case is Cavanagh v. Borough of Ridgefield (N.J. 1920) 109 A. 515.

The Cavanagh case, supra, is analagous to the case at bar for another reason. In this case plaintiff Taute wrote a letter terminating the contract (Exh. 21) pursuant to the provisions of the franchise agreement. Defendant contended that this was in effect a waiver of any damages. In Cavanagh, however, it was contended that the plaintiff had consented to a rescission of the contract because he had notified the defendant "you have stopped us and refuse to pay; very well we submit a claim for what we have done". The New Jersey court held that this was not technically a rescission but merely an acceptance of the situation which was brought about by the fault of the defendant. The court approved the action of the trial judge in charging the jury accordingly. (109 A. at page 516, 517)

In Tanenbaum v. Francisco (N.J. 1933) 166 A. 105, in the syllabus written by the court it is stated:

"It is well settled that, whenever one party to a contract prevents the other from carrying out the terms thereof, the other party may treat the contract as broken and abandon it, and is entitled to such profits as he would have received had there been a complete performance. Such abandonment

is not a rescission of the contract, but is merely an acceptance of a situation created by the wrongdoer."

Under the New Jersey law then it is clear that one who is prevented from performing a contract may claim a breach of the whole contract. In the case the defendant's actions with respect to turn-in costs and lease term, and indeed for advertising and insurance, were such that Taute was entitled to treat the contract as broken and to abandon it.

Moreover, under Tanenbaum, plaintiff should have been allowed to prove the profits which he might reasonably have expected to receive. In Exhibit 22, there is set forth an expected profit per car from Econo Dealers' Reports of \$67.00 per month per automobile. Plaintiff moreover made an offer of proof (Offer of Proof Number Two, Tr. 120) which related to a representation by Mr. Burko, the agent of Econo-Car, that in a ten car operation the result in income to Taute would be \$1,000 per month. We have assigned as a specification of error No. 6, the refusal of the Court to allow Taute to prove profits which were reasonably ascertainable, both under Exhibit 22, and the Offer Of Proof Number Two. The profits, we would expect, would include the reasonable value of the services that Taute provided in the venture, along with his wife Rayetta.

Damages for loss of profits, therefore, may be recovered in New Jersey, and in Montana as well, where it is shown that such loss is the natural and direct result of the act of the defendant complained of, and that the amount is certain and not speculative. See Cruse v. Clawson (Mont. 1960) 352 P.2d 989, 994.

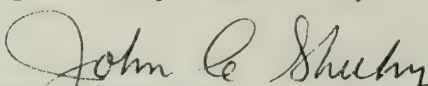
This Court has before it a situation where the plaintiff Taute, prevented from performing the franchise agreement that he thought he had, without fault on his part, has been deprived of the damages to which he was put by the acts of the defendant. He comes to this Court seeking redress for the inequity of the verdict in the light of his damages.

We close our argument by pointing to the language in 25 C.J.S. 867, Damages, Sec. 78, as follows:

"Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party prevented from doing so, he is entitled to be placed in as good a position as he would have been had the contract been performed. The primary measure of damages is the amount of his loss, or, as it has been otherwise expressed, the value of his contract, see supra Sec. 74, which may consist of two items, the one being the party's reasonable outlay or expenditure toward performance, deducting however in computing the damages, the value of the materials on hand, and the other the anticipated profits which would have derived from performance. When a plaintiff sues on a contract to recover the amount he would have received for the full performance prevented by defendant's breach, he seeks in effect to recover as damages the profit from performance of the contract, which profit defendant's breach prevented him from earning* * *."

We therefore respectfully submit that in view of the inadequacy of the verdict, which was directly the result of the refusal of the trial court to instruct properly the jury with respect to damages that plaintiff is entitled to have the case returned for further trial on the issue of damages with respect to the First Claim of his Complaint.

Respectfully submitted,



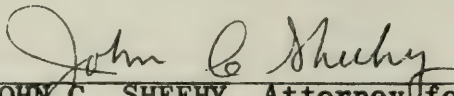
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Attorneys for Appellant, Taute.

CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit, states as follows:


I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JOHN C. SHEEHY, Attorney for
Appellant, Taute.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of April, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, three copies of the within and foregoing Brief of Appellant Taute, addressed to George C. Dalthorp, Esq., Crowley, Kilbourne, Haughey, Hanson & Gallagher, 500 Electric Building, P. O. Box 2529, Billings, Montana 59101.



JOHN C. SHEEHY

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MAY 10 1968

No. 22535 & 22535-A

**United States Court of Appeals
for the Ninth Circuit**

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

**Answering Brief of Appellee Taute to
Brief of Appellant Econo-Car International, Inc.**

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Due Date: May 5, 1968

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(b) Statement of Jurisdiction.

This is an appeal from the United States District Court for the District of Montana, Billings Division.

We have earlier set forth a statement of jurisdiction of both the federal district court and of this appellate court in a brief filed by Taute as appellant in this case. We adopt that statement of jurisdiction here. Jurisdiction of the federal courts is not disputed by the parties.

We further adopt the statement contained in the brief of Appellant Econo-Car International, Inc. as to jurisdiction, appearing at pages 1 and 2 of that brief.

(c) Statement of the Case.

In this case Econo-Car International, Inc. has appealed to the United States Court of Appeals from the whole of the verdict and judgment entered against it. Carl M. Taute, the plaintiff in the court below, has appealed from the decision as to the Second Claim of his Complaint. Consequently in this appeal which has been assigned Docket Nos. 22535 and 22535-A, Taute is both an appellant and an appellee, as is Econo-Car International, Inc. Therefore, for ease of reference we will in this brief call the respective parties either "Econo-Car" or "Taute" for easier reading.

With respect to this brief, however, Taute is answering as appellee the brief of appellant, Econo-Car.

This action was instituted in the state district court by Taute, upon the filing of his complaint against Econo-Car. The complaint was couched in two claims, the first claim alleging a contract and breach thereof by Econo-Car; the second claim alleged that Taute was induced to enter into a contractual rela-

tionship with Econo-Car through fraudulent deceit. For each claim Taute claimed damages.

The prayer of the original complaint was amended during the course of the trial. The amount of Taute's prayer at the close of all of the evidence in the case upon such amendment was a claim of \$32,679.86 (Tr. 265).

This was the total prayed for by Taute with respect to both the first and second claim of his complaint.

Prior to June 28, 1963, Taute was employed in Billings in a managerial capacity with Ryan Grocery Company. He had, a few weeks earlier than June 28, 1963, responded to an advertisement in a local paper. That advertisement had been inserted by Econo-Car and in fact was soliciting possible franchisees to operate a car rental agency in Billings.

In response to the ad, Taute addressed a letter to the box number indicated in the advertisement expressing his interest in such a franchise.

In response to his letter he received some time later a telephone call from a Mr. Burko. As a result of that telephone call Taute, and his wife Rayetta, had two meetings in the Esquire Motel in Billings with Burko and a Mr. Alvarez, whom Burko represented as being on the national sales staff of Econo-Car.

Burko identified himself as Econo-Car's representative and that he was calling Taute in response to his letter. The meetings were worked out as a result of the telephone call (Tr.27).

At the first meeting Burko explained to Taute that Billings had been chosen as a town that could support a car rental operation of the type that Econo-Car had. (Tr. 29) He used a blackboard in the motel room to demonstrate how Taute could

make a profit on a 15 car operation in Billings, using their methods, their tools, resources and instructions (Tr. 29). He produced and gave to Taute a proposed car rental franchise agreement (Tr. 30, 31), the original of which eventually became Exhibit 6 in this action.

Taute took the proposed franchise home with him, studied it for a couple of days and brought it back along with a yellow pad on which he had listed some questions that he wanted to ask in connection with the provisions of the proposed franchise (Tr. 44). He asked those questions at a second meeting, again attended by Taute, his wife Rayetta, Mr. Burko and Mr. Alvarez in the same Esquire Motel. The date of this meeting was June 28, 1963.

The proposed franchise agreement was discussed clause by clause between them, with Burko answering his questions with respect to the franchise agreement (Tr. 35). At that meeting Taute signed the agreement and a copy. Apparently the agreements were sent to New Jersey for signature by a vice president of Econo-Car and one signed copy was subsequently returned to Taute (Tr. 35).

Exhibit 6 is the signed franchise agreement between the parties.

At the time that Taute and Mr. Burko were examining the franchise agreement, before it was signed, Burko made certain false representations respecting what Econo-Car would do if Taute signed the contract. The substance of these conversations were admitted by the Court into evidence. We will be referring to the items of misrepresentation subsequently in this brief and will not refer to them at length here. It is enough to say that the jury, by its verdict, found that representations made by Mr. Burko to Taute were false and that Taute was fraudulently induced

to enter into Exhibit 6 by virtue of those representations.

Taute did not rescind the contract upon learning of the falsity of those representations. Because of certain circumstances that existed at the time he chose to go forward with the contract. This he had a lawful right to do as we will demonstrate later in this brief.

But Taute discovered that even with respect to the contract that he found he had, the defendant breached several important provisions of that written contract. Again these breaches will be discussed fully by us in our argument in this brief and for the sake of brevity we will not set them forth at length here.

The jury, by its verdict, found that the defendant Econo-Car had fraudulently induced Taute to enter into the contract, and awarded him the sum of \$6,000.00 on the second claim, which referred to the fraudulent inducement; it further found that Econo-Car had breached the provisions of its contract and awarded damages to Taute on the first claim of \$1,052.00.

Thus the jury, by its decision, found the defendant Econo-Car guilty on both claims. Taute, however, has appealed from that part of the judgment which awarded him only \$1,052.00 on the breach of contract claim.

The questions involved relate (1) to the validity of statements made by Burko to Taute before the agreement was signed, which Taute contends were properly admitted by the court; (2) the actual breaches of contract as contended for by Taute; and (3) the propriety of the court's instruction on fraud which Econo-Car claims is insufficient and which Taute claims properly covered the subject so far as it went.

(d) Cross-Specifications of Error.

Taute is satisfied with the verdict of the jury and the judgment of the court with respect to the fraud claim, that is, the second claim of the complaint. The verdict on that item was for \$6,000.00.

Nevertheless if Econo-Car is successful in attacking that verdict in this appeal, certain matters came up during the trial on which direction from the United States Court of Appeals is necessary in the event of a re-trial. For that reason only, Taute makes the following Cross-Specifications of Error.

1. The court erred in making the following ruling with respect to billboard advertising:

"THE COURT: (In Chambers) After consideration of the facts shown by the plaintiff's offer of proof taken in open court with the witness on the stand, it is ordered that the plaintiff's motion for permission to argue the problem of the billboards in his opening statement is denied, and the court indicates at that time that if and when evidence as to the billboard matter is offered that objections to it will be sustained * * *."

In connection with this specification of error, the court allowed the offer of proof to be made in the form of direct testimony from the witness Taute on the stand. The offer of proof consists of Transcript pages 5 through 24. For the sake of brevity, we do not repeat in this brief at this point that testimony in full and ask the Court to be excused from the provisions of Rule 18, 2, (d) of the Rule of the United States Court of Appeals, Ninth

Circuit, in this particular. We state that in substance (Tr.10) Econo-Car was to provide billboard and newspaper advertising; that as part of the "institution of an effective and continued sales promotion campaign" promised in paragraph 4C(c) of Exhibit 6 that Econo-Car was to erect seven to ten billboards for a 90 day period in the main traffic arteries around the area of Billings, and provide three full pages of newspaper advertising (Tr. 11).

2. The court erred in refusing Taute's offer of proof, in words and figures as follows:

"Comes now the plaintiff by the witness now on the stand, Carl Taute, and offers to prove, and by this witness will prove, that following the date February 15, 1965, when he finally closed the business of Econo-Car in Billings he thereafter, subsequently, daily and diligently, in substance, searched for a position or job and was unable to locate or obtain such a job in Billings until the 31st day of May, 1965, when he went to work at his present position.

"Plaintiff also offers to prove that at the time of his termination of employment with Ryan Grocery Company, prior to undertaking the operation of Econo-Car in Billings, he was earning a yearly salary of \$12,200, excluding bonuses and other benefits, insurance and so on.

"That the plaintiff so offers to prove."

(Tr.242)

to which the Court sustained the following objection:

"I object to the offer of proof in that it concerns testimony relating to the elements of damages which are not properly allowable under either claim of the complaint. It is irrelevant to any issues in the case."

"THE COURT: The objections to the offer of proof are sustained, and let the record show that this offer of proof is, pursuant to stipulation, deemed to have been made at the time while the witness referred to is on the stand."

(Tr. 243)

(e) Argument

SUMMARY:

Econo-Car has no cause to complain either as to the size of the verdict, or the rulings of the court on admissability of evidence.

The franchise agreement, Exhibit 6, was prepared and printed by Econo-Car. It contained a number of provisions as to what Econo-Car would provide Taute. These provisions were so vague, indefinite and ambiguous that no court could construe, interpret or enforce those provisions without resort to extrinsic or parol testimony as to what the provisions meant.

The trial court limited Taute to parol evidence which would explain indefinite or vague provisions of Exhibit 6. It refused to allow Taute to introduce evidence which the court felt would contradict or vary the terms of Exhibit 6, even though under the law on a fraud claim Taute should have been allowed to do this.

The court, therefore, by its rulings on the admissability of evidence, limited Taute only to such parol evidence as tended to explain provisions of Exhibit 6 that were vague and indefinite and that have been written in the first instance by Econo-Car.

Econo-Car may not complain that Taute did not elect to rescind the contract immediately upon learning of the falsity of Burko's representations. Taute had the right, under the law and the cases, both in Montana and New Jersey, either to rescind the contract at the time of the discovery, or to accept the contract, make the best of his bargain, and pursue Econo-Car for damages for the fraudulent deceit. Taute, as he had a right to do, chose the latter. He did not thereby waive his right to damages for the fraud. The court submitted the question of waiver of damages for fraud to the jury under proper instructions and the jury found against Econo-Car on that question of fact.

With respect to Taute's Cross Specifications of Error in this part of the appeal, if any re-trial of this cause becomes necessary, Taute should be allowed to introduce evidence with respect to representations made to him by Mr. Burko as to billboard advertising; and as a part of his damages, he should be allowed to recover for his enforced idleness by virtue of the acts of Econo-Car from February 15, 1965, until he found a job on May 15, 1965, after diligent search.

ARGUMENT:

Upon studying the issues presented by the pleadings, the rulings made by the court, and the size of the verdict on the first claim, the breach of contract claim, one wonders what prompts Econo-Car to appeal at all.

The court protected Econo-Car with respect to the

fraudulent representations made by Mr. Burko to the fullest extent during the trial. It limited evidence of parol representations by Mr. Burko only to those that were within ambiguities found in Exhibit 6, the franchise agreement. It did not permit any representations made by Burko that would vary or contradict the terms of the franchise agreement, although under a fraud claim such representations would have been admissible under Montana law.

In other words, the trial court gave Econo-Car the full benefit of Kelly v. Ellis, 39 Mont. 597, 104 P. 873 (1909). It refused to give Taute the benefit of the decision in Koch v. Rhodes, 57 Mont. 447, 188 P. 933 (1920) as to admissibility of evidence under a fraud claim. The trial court so ruled although in Koch, the Montana Court specifically distinguished Kelly v. Ellis as not being applicable in a fraud case on the admissibility of evidence (See 188 Pacific Reporter, page 936).

It is elementary that parol evidence of negotiations or discussions of parties leading up to a contract are admissible to explain its terms, to aid the court in its construction, or to explain vague, indefinite or ambiguous provisions of the contract. This is inherent both in statute law and in decided cases in Montana.

The pertinent Montana statutes are as follows:

"93-401-17(10521) The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in

the position of those whose language he is to interpret."

"13-713. (7538) Contracts explained by circumstances. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

"13-308. (7480) Actual fraud, acts constituting. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;

4. A promise made without any intention of performing it; or,

5. Any other act fitted to deceive."

"93-401-13. (10517) An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be

between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 93-401-17, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

"13-310. (7482) Actual fraud a question of fact. Actual fraud is always a question of fact."

The foregoing statutes are all sections from the Revised Codes of Montana, 1947.

As we said, the trial court limited the parol evidence only to that which would explain ambiguities or unclear provisions of the franchise agreement. That franchise agreement had been prepared and printed by Econo-Car. Under casebook law, the provisions thereof were to be construed against Econo-Car. The trial court limited the parol evidence so as to explain only a few of the provisions of the Econo-Car franchise agreement.

Parol evidence of conversations which does not vary the

terms of the written contract is admissable (Stone-Ordean-Wells Co. v. Anderson, 212 P. 853, 66 Mont. 64).

Extrinsic evidence is admissable to show what the parties meant by what they said, but not to show something other than what they said (Peerless Casualty Co. v. Mountain States Mutual Casualty Co. (U.S.C.A., 9th, Mont.) 203 F.2d 268).

In McNussen v. Graybeal (Mont. 1965) 146 Mont. 173, 186; 405 P.2d 447, 454, 455, the Montana Court said:

"It is well settled law that the question of whether an ambiguity exists is one of law for the court. But where there is a conflict of testimony as to what were the intentions of the party toward the use of the ambiguous word, determination of the true meaning is one of fact for the jury. In National Cash Register Co. v. Wall, 58 Mont. 60, 62, 190 P. 135, the court in construing the word 'special' to be ambiguous said: '* * * indeed without a description * * * aliunde the contract itself, it is difficult to conceive how a jury could understand the meaning of the word 'special' unaided by any account of the circumstances and the conversation leading up to the making of the contract and the meeting of the minds of the parties upon the particulars necessary to its consummation* * * In no other way could the issues the jury were called upon to settle be made intelligible to them'. Further, sections 13-702 and 13-713, R.C.M. 1947 explicitly allow

extrinsic evidence to explain the true intentions of the parties where a word is found to be ambiguous."

In New Home Sewing Machine Company v. Songer, 7 P.2d 238,

91 Mont. 137, the Court said:

"If the language of the agreement is clear, it needs no interpretation; the intention of the parties is to be ascertained from the writing alone (citing cases). Resort may be had to parol evidence in aid of interpretation only when the contract appears on its face to be ambiguous or uncertain. (citing a case and statutes)

"While it is true that the term 'finance plan' is in general use, we are not prepared to say that it has any well-defined or fixed meaning. It is a matter of common knowledge that the finance plan employed in the business world and the distribution and disposal of merchandise are varied, and that the use of the term by one concern would mean one thing, and when used by another would denote something entirely different.

"The meaning of the term used is not so free from doubt that it can be said as a matter of law that it furnishes its own interpretation. That the writing does not contain all of the conditions of the agreement is apparent; resort must be had to extrinsic facts for an explanation of plaintiff's finance plan. The agreement is uncertain and ambiguous and the court ruled correctly in

admitting the evidence."

Having in mind, therefore, the foregoing statutes and decisions of the Montana Court, let us look at some of the provisions of the franchise agreement in this case, Exhibit 6.

In paragraph 4,C,a, the franchise agreement states:

"ECONO-CAR AGREES:

* * *

C. To furnish guidance to the ECONO-DEALER in establishing, operating and promoting the business of renting automobiles with respect to:

a.) the selection of premises for the establishing of places of business."

In that provision of the franchise agreement, what does the word "guidance" mean? How could any court interpret or define the obligations of Econo-Car to Taute under that provision without resort to extrinsic evidence? Is not parol evidence absolutely necessary if any effect is to be given to the quoted provision of the contract?

As a matter of fact, Burko did make statements as to what Econo-Car would do in aiding Taute to select a location for his rental business in Billings. The subject was discussed by Taute and Mr. Burko and Mr. Alvarez before he signed the contract (Tr. 36). In response to Taute's quite natural question as to what the clause meant, Burko responded that Econo-Car had made a survey of Billings under his supervision and had located the three top locations in Billings and that in connection with the establishment of his premises they would send a three man crew in who knew the top places, although Taute would make the final decision as to which of the three he wanted (Tr. 37, 38). Taute further testified:

"Q. When he made that statement to you did you rely on what he was saying?

A. Certainly."

(Tr. 39)

We respectfully submit that the provision with respect to the selection of the place of business was ambiguous in Exhibit 6, that the ambiguity resulted from the language used by Econo-Car and that parol evidence was admissable to explain what that provision meant. Otherwise the jury could not intelligently decide whether the contract had been performed by Econo-Car.

Moreover, this evidence did not vary or contradict or add to the terms of the franchise agreement. It merely explained that agreement. There is no merit therefore to Econo-Car's Specification of Error No. 1 as to this evidence.

Similarly, other evidence was necessary to explain other provisions of the contract. Again let us look at the franchise agreement, Exhibit 6, for another example of ambiguity. It is provided in paragraph 4,C,c.) as follows:

"4.ECONO-CAR AGREES:

* * *

C. * * *

c.) The institution of an effective and continued sales promotion campaign, making available to the ECONO-DEALER sales and promotional aids above and beyond the basic ECONO-DEALER'S kit, as and when such aids are developed by Econo-Car's staff."

Could any court or any jury, looking at that provision, construe, interpret or enforce the obligations of Econo-Car without resort to extrinsic evidence as to what the provision meant? Do the

words "the institution of an effective and continued sales promotion campaign" explain themselves? Certainly not. Something must be added in order to determine what the parties mean by the provision. And here again the Court permitted extrinsic parol evidence, and properly so. With respect to that provision, and as to what it meant, Taute testified that in his conversation with Mr. Burko, Mr. Burko told him that in return for the \$6,000 that he was paying for the franchise and as to what it would buy, there would be in addition to the three man crew, three full page newspaper ads in the Billings Gazette to publicize the opening; that the three man crew would work and call on every business which their experience indicated would be a prospect for car rental business (Tr. 40). Further, that in the way of start-up expenses (Tr. 41), Taute testified that Burko said that Econo-Car would spend every cent of that \$6,000 franchise fee in getting Taute's operation going (Tr. 42).

Certainly this evidence is only explanatory of what Econo-Car meant with respect to the language "the institution of an effective and continued sales promotion campaign". The Court properly admitted this evidence.

For some reason that we do not fathom, the Court excluded the conversation with respect to both billboard advertising, although it was part and parcel of the same conversation relating to the newspaper ads and the spending of the \$6,000 franchise fee. For some reason the Court distinguished between billboard advertising and newspaper advertising in sales promotion campaigns. We have contended of course in our Cross Specification of Error No. 1 that the evidence relating to billboard advertising was also admissible and counsel for Taute should have been allowed

to make reference to it during the opening statement. The verdict of the jury, however, cured the objection.

However, the newspaper advertising was further expanded in Schedule A attached to the franchise agreement, Exhibit 6, for in paragraph 5 there was a provision for announcement advertising ads at the expense of Econo-Car in the local newspaper.

Finally, Econo-Car objects to the admission of evidence respecting the option of deciding the term of the lease of the automobiles. That evidence came about as follows:

In Schedule B, which is attached to Exhibit 6, one finds the "Econo-Car Lease Plan" relating to automobiles to be supplied to Taute by Econo-Car. In Schedule B, in paragraph 2, is found the following language: "Each lease shall run for a minimum period of 12 months to a maximum of 18 months"* * *"The ECONO-DEALER shall execute a standard form of ECONO-CAR LEASE AGREEMENT before delivery of any vehicles."

There is a glaring ambiguity in the quoted provisions of Schedule B. The agreement does not state at whose option, Econo-Car or Taute, or both, will the lease on individual automobiles be terminated between the twelfth month and the eighteenth month. Taute contended that during his conversations with Mr. Burko he was informed that it would be at his option (Tr. 44). Further Mr. Burko gave reasons why Taute would have the option as to the length of term between the twelfth and the eighteenth month (Tr. 44-45). Here again the evidence was certainly admissible to explain what could not be determined from the contract itself -- which party had the right of deciding when the automobiles would be turned in between the twelfth and the eighteenth month. Parol evidence on that point was admissible. It did not

vary the written contract between the parties.

We may note parenthetically, however, that Econo-Car assumed the option right to itself when it presented Exhibit 7 to Taute for signature. In that instrument, the Lease Agreement, it was provided that Econo-Car would have the option of deciding between the twelfth and the eighteenth month, except that if it did it would have to provide Taute with a replacement model of the same current year and model.

We believe that we have demonstrated by the foregoing that there is no substance to Specification of Error No. 1 posed by Econo-Car.

Since the mentioned items of evidence not only explained the ambiguous portion of the contract, but also provided the basis for Taute's fraud claim, the evidence was sufficient to demonstrate to the jury that Mr. Burko made false representations to Taute with the intention of inducing him to enter into the franchise agreement, and that at the time he made the representations he knew they were false or that they would not be performed, and that Taute relied upon them. Accordingly it was not error to deny the various motions of Econo-Car for non-suit or directed verdict as the case may be, or to refuse to strike the testimony relating to Mr. Burko's conversations. This disposes therefore of Econo-Car's Specifications of Error No. 2, 3, 4, and 5.

The fraudulent promises made by Mr. Burko, therefore, came into the evidence under the rule that ambiguous or vague provisions of contracts may be explained by extrinsic oral evidence. Those same items of evidence, however, because they were fraudulent constituted a basis of Taute's first claim for fraud. Econo-Car contends that Taute, upon discovering the falsity of those repre-

sentations, should have immediately rescinded the contract, and that because Taute did not do so he waived his right to damages for the fraud. This, however, is a misconception of the law.

This Court, under Erie applies the law of the forum to cases in the federal jurisdiction. We apprehend that this Court would apply Montana law, as to a tort claim such as one for fraudulent deceit, even though the franchise agreement in this case recited that with respect to the enforcement of the contract, New Jersey law applied. Irrespective of whether Montana law or New Jersey law was applicable, however, the result would be the same in this case with respect to the fraud claim.

In Koch v. Rhodes (Mont. 1920) 57 Mont. 447, 188 P. 933, 937, the Montana Court said:

"Under our statutes and under the authorities, one who has been fraudulently induced to enter into a contract has the choice of either rescinding the contract by restoring or offering to restore what he has received under the contract, and recover what he has parted with, or he may affirm the contract, keeping whatever property he may have received or advantage gained, or sue in an action for deceit for the damages suffered by reason of the fraud. While the affirmance of the contract precludes him thereafter from rescinding, he may still sue for damages, unless he waives that right. *Como Orchard Co. v. Markham*, 54 Mont. 438, 171 P. 274.

* * *

"And while by an affirmance of the contract

one may waive, not only his right to rescind, but also his right of action for the deceit, it is only when such intention is clearly manifested that such a waiver will be declared. There is a clear distinction between the waiver of the right to rescind and the waiver of the right of action. This is pointed by Mr. Colley in his work on torts, paragraph 257, as follows:

'The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having the right to complain of the fraud had freely and with full knowledge of his right in some form clearly manifested his intention to abide by the contract and waive any remedy he might have had for the deception'." (Emphasis supplied)

Thus a waiver of the right to rescind is not the same as the waiver of a right to pursue damages for the deceit. In an earlier Montana case, Hillman v. Luzon Cafe Company (Mont. 1914) 49 Mont. 180, 142 P.643, where it was contended that alleged representations whether pleaded or not were not admissible because the written contract superseded all prior negotiations between the parties and presumably contained the full text of the agreement, the court held that such representations were admissible saying that the plaintiffs had mistaken the full force of the defendant's position which is that the contract was procured by false representations. The Montana Court further dis-

tinguished in the Hillman case the fact that the representations did not tend to vary or contradict the terms of the written contract. We have that situation here. The false representations did not change the ambiguous terms of the franchise agreement in this case; they simply explained what Taute thought he was getting under those ambiguous terms.

This Appellate Court is not called upon to decide in this case whether fraudulent representations made by a party for the purpose of inducing another to enter into a contract are admissible, even though they vary the terms of the written contract. That is not the case here. The fraudulent representations do not vary in one iota the franchise agreement. The ambiguous terms are Econo-Car's own creation. It cannot complain if its agents, Mr. Burko and Mr. Alvarez, used those ambiguous terms to mislead Taute. All of those cases therefore cited by Econo-Car in its appellant brief to the effect that fraudulent representations which vary the terms of written contracts are not admissible, are of no force here. This Court is not faced with that situation.

New Jersey agrees that a party who is induced by deceit to enter into a contract may affirm the contract and pursue his action for damages on the deceit. In Peder v. Smith (N. J. 1927) 139 A. 23, it is stated:

"Where a party has paid money on a contract entered into through misrepresentation, he may bring an action for deceit against the party guilty of fraud; he may waive the fraud and sue upon a breach of the original contract; or rescind and recover what he has paid on it."

We turn now to Econo-Car's Specification of Error No. 6 with respect to the instruction of the Court on fraud. Taute contends that this instruction fully comprehended the law on fraud and told the jury what it must find in order to find a verdict in favor of Taute. The Court having properly instructed the jury, it is presumed that the jury did its duty under that instruction.

In Lee v. Stockmen's National Bank, 63 Mont. 262, 283; 207 P. 623 (Mont. 1922), the Court stated:

"In order to go to the jury the plaintiff must make out a prima facie case embracing the elements of actual fraud, viz.: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; and (8) his right to rely thereon; (9) his consequent and proximate injury (26 C.J. 1062)."

The trial court in its instruction to this jury included all of these elements within its instruction and properly told the jury what it must find in order to hold Econo-Car guilty of fraudulent deceit. Therefore, there is no merit to Econo-Car's Specification of Error No. 6.

With respect to Econo-Car's Specification of Error No. 7, since the offered instructions are not set out in totidem verbis, pursuant to Rule 18 of this Court, we assume that Econo-Car is not serious about this Specification.

Specification of Error No. 8 of Econo-Car relates to the Court's instruction on insurance.

The evidence is uncontraverted that Econo-Car changed the provisions relating to insurance without the consent of Taute. We have fully expanded on this subject in Taute's brief as appellant before this Court.

Econo-Car's objection here is that Taute was not damaged by the changes in insurance. Econo-Car does not explain how he was not damaged, since it is positive in the evidence that Econo-Car collected \$5.00 per month per car or an additional \$50 per month for an insurance cost which it agreed under its franchise agreement to bear itself. In paragraph E of Exhibit 6, such insurance was to be provided by Econo-Car "at no additional expense" to Taute. Econo-Car under the evidence in this case did charge additional expense to Taute for the insurance that Econo-Car provided.

Econo-Car is contending under this Specification of Error that Taute was playing no more than he bargained for and therefore he was not damaged. This is not a true statement of the evidence. Under Exhibit 7, the lease agreement, in paragraph 2 of that exhibit, with respect to the charges to Taute for the rental of the automobiles during the lease term, it was provided that any increase or decrease in the rates charged to Econo-Car by the holder (Chrysler Leasing) should be passed on to Taute. When Chrysler Leasing reduced its rates to Econo-Car, Econo-Car in turn passed that reduction on to Taute. But then it added an increase for the cost of insurance. It was not thereby giving Taute what he bargained for in the cost of rental of the automobiles. His bargain was for a rate per month that would increase

or decrease depending upon the rates charged to Econo-Car by Chrysler Leasing. In effect Econ-Car was not passing on to Taute the decrease in the rental rate charged by Chrysler, because Econo-Car was additionally charging Taute the cost of insurance after it had received a rate decrease from Chrysler. It is unfair to contend that in this situation Taute was receiving "what he bargained for" with respect to the rates to be charged him for the rental of automobiles. Taute was entitled to any reduction that Chrysler Leasing granted with respect to those automobiles to Econo-Car. Econo-Car was not entitled, since it was to supply insurance at its expense, to pass on such insurance costs to Taute, irrespective of the increases or decreases that Chrysler Leasing may have granted. There is absolutely no merit, therefore, in Econo-Car's Specification of Error No. 8.

With respect to Econo-Car's Specification of Error No. 9, again we find no cause for complaint as far as Econo-Car is concerned. The record is replete with breaches of the lease term arrangement with Taute, as to turn-in provisions, as to the length of term, as to effective and continued advertising, and as to insurance costs. Taute has fully expanded on these in his Appellant's Brief in this case. The law stated by the Court in its instruction to the effect that if these breaches were not assented to by Taute, he could recover damages therefor, is a correct statement of the law. The Court in this case went awry on the damages that could be recovered, since the trial court refused to regard the actions of the defendant Econo-Car as a repudiation of the whole contract and thus limited the damages that Taute could receive. The jury in this case allowed Taute all of the damages for breach of contract that it could allow under the instructions of the Court.

limited as the jury was to consideration of insurance costs, and costs for individual items of damages on the various breaches. Except for the amount of damages which the Court allowed on the breach of contract claimed, it correctly stated the law for the jury, and there is no merit in Econo-Car's objection to that law.

We will close our argument by speaking briefly of the damages that were recovered and the damages that ought properly be allowable to Taute in this case. His verdict, in total, of \$7,052.00 is inadequate to cover the damages which he sustained in this case. The verdict does not amount even to one-half of his out-of-pocket expenses, considering the franchise fee, the monies which he invested in the venture, and the operating loss which he sustained during the time that he was an Econo-Car dealer. He was entitled, under each claim, to be fully compensated for his loss.

The measure of damages for fraudulent deceit is set forth in Sec. 58-602, RCM 1947, which provides:

"58-602. (7574) Fraudulent deceit. One who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

And again the Revised Codes state:

"17-401. (8686) Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether

it could have been anticipated or not."

Under those statutes, certainly Taute was entitled to all of his out-of-pocket expenses on the fraud claim. The jury awarded him the amount of his franchise fee, the sum of \$6,000.00. Certainly his franchise wasn't worth anything to him, when it is considered what additional time, effort, money and investment he had to expend and employ under his arrangement with Econo-Car. The amount of the damages on the fraud claim is acceptable to Mr. Taute. However, he cannot agree that the damages which he received for the breach of contract are adequate. No consideration was given under the Court's instruction on the breach of contract to his actual out-of-pocket expenses or the fact that the accumulated effect of Econo-Car's actions was to prevent him from performing the contract that he thought he had for a car rental agency.

There are parts of the Court's instruction with respect to the breach of contract that were incorrect; we have set them out in Taute's appellant brief in this case. These inaccuracies, however, were not to the disadvantage of Econo-Car; rather they were to its advantage.

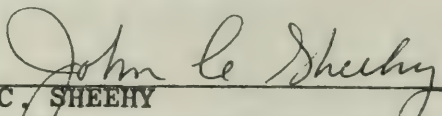
Finally we wish to say a word in support of the Cross Specification of Error in this brief of Taute, relating to his offer of proof for the time that he expended. He should have been recompensed for his enforced idleness. It was so held in Navarro v. Jeffries (Calif.) 187 C.A. 2nd 454 -- 5 Cal. Rptr. 435.

(f) Conclusion

We conclude this brief by submitting to the Court that the judgment with respect to the fraud claim should be affirmed and that the judgment with respect to the breach of contract claim

should be returned to the District Court for further proceedings relating only to the issue of damages. There is no need, in the light of the uncontraverted evidence in this case, to go through the breach of contract provisions with another jury.

Respectfully submitted,



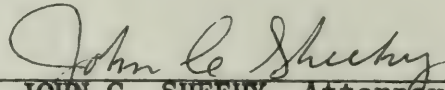
JOHN C. SHEEHY
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Attorneys for Appellee, Taute.

CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit, states as follows:

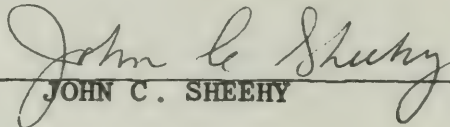
I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



JOHN C. SHEEHY, Attorney for
Appellee, Taute

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, three copies of the within and foregoing Brief of Appellee, Taute, addressed to George C. Dalthorp, Esq., Crowley, Kilbourne, Haughey, Hanson & Gallagher, 500 Electric Building, P. O. Box 2529, Billings, Montana 59101.



JOHN C. SHEEHY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF DEFENDANT ECONO-CAR INTERNATIONAL, INC.
ANSWERING BRIEF OF PLAINTIFF CARL M. TAUTE

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FILED

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Clerk

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ARGUMENT

A. Plaintiff's Damages Limited by What he Would have Received Absent Any Breach

The Court's instructions are based upon the rule that the measure of damages for breach of contract is the amount which will compensate the party aggrieved for all detriment proximately caused by the breach not exceeding what the aggrieved party would have received had the contract been performed by the defendant.

Plaintiff not being satisfied with this standard, is seeking damages in the nature of restitution to his original position. Plaintiff is seeking not only any damages flowing from the alleged breaches, but is also seeking to recover his capital contributions, his alleged operating losses and compensation for the time expended by him and his wife in the operation of the business. Thus, plaintiff does not seek damages for breach of contract, but wants total and complete restitution at defendant's expense irrespective of whether plaintiff's operations would have been more successful if none of the alleged breaches of contract had occurred. We know of no authorities--New Jersey, Montana, or otherwise, setting forth such a measure of damages.

No New Jersey law was cited by plaintiff's counsel to the trial court. Nonetheless, plaintiff is correct in stating that the contract provides that the contract is to be construed in accordance with New Jersey law. Whether New Jersey law or Montana law applies appears immaterial in view of the fact

that both states generally follow the basic rule for measuring compensatory damages for breach of contract as stated in Comment a., Restatement of Contracts, § 329 as follows:

"In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract. . . ."

Even though the New Jersey authorities cited in plaintiff's brief are not in point on the facts (because those cases and authorities involve situations where a party to a contract, and in particular a contractor, was prevented from fulfilling his terms of the contract by the other party's breach thereof) these cases nevertheless apply the same measure of damages. For example, quoting from plaintiff's brief, the Court in Tanenbaum v. Francisco, N.J. 1933, 166 Atl. 105, stated in part:

"It is well settled that, whenever one party to a contract prevents the other from carrying out the terms thereof, the other party may treat the contract as broken and abandon it, and is entitled to such profits as he would have received had there been a complete performance." (Emphasis ours).

See also another quotation from plaintiff's brief:

"Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party prevented from doing so, he is entitled to be placed in as good a position as he would have been had the contract been performed . . . When a plaintiff sues on a contract to recover the amount he would have received for the full performance prevented by defendant's breach, he seeks in effect to recover as damages the profit from performance of the contract, which profit defendant's breach prevented him from earning." 25 C.J.S. 867, Dam-

In this case the maximum that plaintiff could be entitled to receive under the breach of contract portion of the action would be his actual loss sustained by reason of any breaches of the contract. This is not, however, what plaintiff is seeking. The plaintiff instead, is attempting to convince the courts that he would be entitled to be placed in as good a position or better than if he had never entered into the contract in the first instance.

Under Montana law plaintiff's damages for alleged breach of contract would be clearly limited to that which he would have received had the contract been fully performed by the defendant.

Pertinent Montana statutes include the following:

"17-301. Measure of damages for breach of contract. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (R.C.M. 1947, § 17-301.)

"17-302. Damages must be certain. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (R.C.M. 1947, § 17-302.)

In Myers v. Bender, 46 Mont. 497, 129 Pac. 330 (1913)

plaintiff brought an action to recover for services as an attorney rendered to the defendant, a part of which compensation was based upon a contingent fee arrangement involving the value of land and money recovered in an action. One of the issues involved in the appeal was whether or not the district court applied the proper measure of damages for the breach by

defendant of his obligation to pay to plaintiff the amount contracted for. The Court stated in part:

"If the defendant had made full payment upon the completion of plaintiff's services, he would have fully performed his contract. Since he did not make such payment, he is to be held to compensate plaintiff for the detriment 'proximately caused' by the delay. 'In the ordinary course of things' the only detriment which could result to him was the loss by plaintiff of the use of the money. Therefore full compensation for the detriment thus caused is to be measured by the principal amount due, together with interest at the legal rate up to the date of trial, allowing, of course, credit for such payments as have been made, at their respective dates.

* * *

"The statute (referring to R.C.M. 1947, § 17-301) embodies the common-law rule, and the authorities generally agree that the damages recoverable in such cases must be limited to such as may fairly be supposed to have been within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. In no case is the plaintiff entitled to recover anything more than he would have received had the contract been performed by the defendant on his part, assuming that it had been performed." (Emphasis ours). 129 Pac. at p. 333.

In Harrington v. Moore Land Co., 59 Mont. 421, 196 Pac. 975 (1921) plaintiff buyers of land sued the seller to recover damages for alleged negligence in sowing crops on a certain portion of the land. The court in discussing the measure of damages stated in part:

"After an examination of the complaint and all of the evidence in this case, we are of opinion that the rule of damages applicable is that plaintiffs are entitled to recover such reasonable amount as will compensate them for defendant's failure to do the work agreed, and such additional amount as in the ordinary course of things would likely result from the breach of

contract. The damages recoverable, however, must be clearly ascertainable in both nature and origin.

* * *

"In no event would the plaintiffs be entitled to recover anything more than they should have received had the contract been performed by the defendant on its part, assuming it had been performed." 196 Pac. at p. 976.

In Mitchell v. Carlson, 132 Mont. 1, 313 P.2d 717

(1957) a purchaser of a residence sued the builder for damages for defects in construction. The court discussed the measure of damages, the instructions given and R.C.M. 1947, § 17-301, and then stated:

"Applying the statutory rule of damages to this case it is apparent that plaintiffs will be compensated only for the 'detriment proximately caused' by the breach, viz., the cost of making the repairs necessary to complete the house in accordance with the parties' agreement. The phrase 'proximately caused' restrains the jury from awarding damages beyond the amounts proven in the evidence at the trial resulting from defendant's breach of contract." 313 P.2d at 720.

Plaintiff in a slightly different approach to the amount of damages, attempts on page 33 of his brief to have the statements made by Burko prior to the execution of the franchise agreement which were strictly and solely in the nature of projected income figures to be taken as a measure of damages here. This testimony was, of course, not admissible for any purpose and certainly not for the purpose of showing the amount of damages sustained by plaintiff by reason of any breaches of contract of the defendant. In addition, plaintiff also is attempting to take the figures from Plaintiff's

Exhibit 22 as something of a guarantee of profit in his business and states that he should be entitled to comparable profits. Exhibit 22 is, of course, merely a general guide for Econo dealers so that they could better analyze their own operation to see if they were comparing favorably to other Econo dealers. This also, would have no relationship to the measure of damages for any breaches of contract which the defendant was guilty of.

B. Specific Breaches Alleged by Plaintiff

1. Term of Lease on Automobiles.

One of plaintiff's principal complaints revolves around the length of lease term of the automobiles. An outline of the background may help.

One of the obligations of the defendant under the franchise agreement was to make available to the plaintiff a quantity of automobiles for use in the rent-a-car business. Obviously, the terms and conditions under which Econo-Car itself might be able to obtain the necessary automobiles could well change from year to year. As these circumstances changed, it would be only natural that the terms and conditions under which Econo-Car would supply automobiles to its dealers would be expected to change to fit the circumstances. The franchise agreement itself clearly contemplates and authorizes such changes. For example, the agreement provides that the vehicles "may be made available to the Econo dealer on the basis of sale, lease, or whatever other method or methods that Econo-Car shall negotiate in behalf of all of its Econo dealers."

(Para. 4.D, Pltf's. Exh. 6). The agreement also provides that Econo dealer (plaintiff here) agrees that all vehicles "must be acquired by the Econo-dealer on the basis described in Schedule "B", or upon such other basis as may be presented by Econo-Car for the benefit of the entire Econo-Car rental system." (Para. 5.C of Pltf's. Exh. 6).

Turning to the facts here, Schedule "B" of Plaintiff's Exhibit 6 provides that each lease thereunder should run for a minimum period of twelve months to a maximum of 18 months. Even though plaintiff testified at trial that it had been explained to him that he would have the option of extending the lease, he nevertheless signed Plaintiff's Exhibit 7 providing for a lease period of 18 months but giving Econo-Car the option to shorten it to 12 months. This instrument was signed during the summer of 1963 prior to his starting any operations whatever.

Causing considerable confusion in the trial of this case was the fact that plaintiff elected not to commence operations with 1963 model vehicles, but rather elected to wait until the 1964 models came out. At the time that the original franchise agreement was signed as well as the time that the lease agreement, Plaintiff's Exhibit 7, was signed, 1963 model automobiles were in use by the Econo-Car dealers. Schedule "B" of the agreement refers to these 1963 automobiles, and the 1964s had not yet been made.

Quite obviously, Econo-Car International, Inc. negotiated arrangements with its vehicle supplier, Chrysler Leasing Corporation, on a slightly different basis for the 1964

automobiles than it had for the 1963 automobiles. As a result of these changed circumstances, Econo-Car notified all dealers under cover of letter dated November 27, 1963, that there would be a substantial rate reduction in the amounts that the local dealers had to pay per month for each automobile in their fleets, and also that the 1964 automobiles would be available on a 12 month leasing term instead of the previous 18 month, with the option in either party to extend the term for up to two months. (See Plaintiff's Exhibit 9). This was the arrangement under which the 1964 models were put out to the Econo dealers. This was the arrangement under which the parties were operating when the exchange of correspondence occurred (Plaintiff's Exhibit 11) wherein plaintiff requested special permission from Econo-Car International, Inc. to hold the vehicles in his fleet past January 1, 1965, instead of surrendering them during the 13th or 14th month of service. It seems worthy of note that the plaintiff not only did not complain of the defendant's arrangements as to the lease term at the time of the promulgation of the terms for 1964 but he is also not shown to have complained of the reduction in rates that he had to pay for the cars. It is obvious that the parties were operating in 1964 on the basis of the terms of Plaintiff's Exhibit 9 and not under plaintiff's Exhibit 7.

Under letter dated October 5, 1964, Econo-Car International, Inc. announced to its Econo-Car dealers that the 1965 model cars would be delivered on a 6-month lease term, with the Econo-dealer having the option to extend the term to 12 months. (See Plaintiff's Exhibit 10). The ironic part of plaintiff's

complaints with respect to these changes in leasing terms is not that changes in leasing terms and arrangements were obviously contemplated by the basic franchise agreement, but rather that each of these changes would appear to have been beneficial to the Econo-Car dealers themselves. These leases progressively shortened the lease term and progressively gave the local dealers a greater option as to their power to extend the lease. As stated in Plaintiff's Exhibit 9, a shorter lease term not only enabled the Econo-Car dealers to be in the desirable position of having the latest model and relatively new vehicles for rental, but also to effectuate a saving on maintenance and service costs which could usually be expected to increase with the greater age of the automobile.

We frankly fail to see where there is any evidence of a breach of a contractual provision with regard to the length of a lease term, and, if there was such a breach, we fail to see wherein plaintiff has proved any damages resulting therefrom. The flexibility of the Econo-Dealers lease term for the 1965 (Pltf's. Exh. 10) automobiles would appear to be just what Taute would have wanted.

2. Insurance Term Provisions.

The franchise agreement, Plaintiff's Exhibit 6, provided that Econo-Car would provide insurance including, among other things, collision insurance with no more than \$100 deductible. This insurance was to be provided at "no additional expense". However, it should be noted that Taute made only one monthly payment to Econo-Car for the rental costs on the automobiles and this payment would necessarily include the cost of

insurance. What happened to the insurance rates and other rates is best illustrated by following a two-door Valiant. Plaintiff at the time of his Grand Opening paid \$129 per month for a two-door Valiant. In December, 1963, Econo-Car reduced this monthly rental required to be paid by the plaintiff to \$118. One month later, it announced under letter dated December 26, 1963 (Pltf's. Exh. 13) that it was forced to increase its outlay for insurance premiums and that it was finding it necessary to pass on an increase to the Econo-dealers of \$5 per month. As a result, Taute then had to pay \$123 for the Valiant that he had originally contracted to pay \$129 for.

Under the Court's instructions to the jury (Tr.V.III, p.283) the jury was apparently authorized to award the additional amount paid by plaintiff, \$5 per car per month, from January 1, 1964 through the end of the lease term. This was error in that it invaded the province of the jury and actually was contrary to the express provisions of the contract. We fail to see how the defendant could be said to have breached the contract when during this period it was charging the plaintiff \$123 per month for the Valiant when plaintiff had actually contracted to pay \$129 per month for the Valiant.

Commencing approximately September 1, 1964, defendant effectuated a change in its collision insurance coverage from \$100 deductible to \$250 deductible. In their information circulars, (Plaintiff's Exhibit 13) Econo-Car explained that they were presented with the choice by the fleet insurance carrier to either increase the deductible to \$250 or pay an additional \$8 per month per car. Econo-Car elected to increase the

deductible as was done by their competition.

The increase in deductible collision coverage would have the effect of increasing plaintiff's exposure for collision damage from \$100 to \$250 on those rentals on which he was unable to sell additional insurance to the renter which would eliminate any losses in the event of a collision. The automobile renter would presumably be responsible in the event that his negligence caused the collision damage so that the dealer's losses would be reduced to a minimal figure. However, if this change were not consented to by plaintiff and did constitute a breach of the franchise agreement, the Court's instructions allowing the difference between the value of a collision policy with a \$100 deductible and a policy with a \$250 deductible would allow the jury to award more than ample damages for this alleged breach. (See Tr.V.III, pp. 283-284).

3. Turn-In Charges.

Plaintiff has made much of changes in turn-in requirements. It is interesting to note, however, that the original franchise agreement contains no specifications with respect to turn-ins. It is also interesting to note that plaintiff was not relying upon Plaintiff's Exhibit 7 or upon Plaintiff's Exhibit 8 as contended at trial, when he protested to Chrysler Leasing Corporation's turn-in charges, but rather was relying upon Econo-Car's letter dated February 18, 1964. In Plaintiff's Exhibit 12 he states: "At this point I will pay only legitimate charges as provided for in your letter of February 18, 1964 'Car Condition-Turn-In of Lease Cars Inspection Guide'."

When Taute turned in his 1964 automobiles in November

of 1964, he received invoices from Chrysler Leasing Corporation making turn-in charges of several hundred dollars. He immediately and vociferously protested to Econo-Car (see Plaintiff's Exhibit 12) whereupon Econo-Car interceded with Chrysler Leasing Corporation and obtained a reduction of or elimination of all of these charges. According to plaintiff's own testimony his actual damages sustained under his own interpretation of the turn-in requirements amount to the cost of one tire, the sum of \$20.50. (See Tr.V.II, p. 185). More significantly, plaintiff's counsel stated in his brief that "the matter was satisfactorily taken care of for Taute." (p. 9). Obviously, the award by the jury for the alleged breach of contract more than included any possible damages incurred under any possible breach of arrangements regarding turn-in requirements.

4. Plaintiff's Claim of Breach of Advertising Provisions.

Plaintiff complained, rather weakly, that the defendant breached the provisions of the contract with respect to advertising. Some changes were made in the advertising procedures, one of which was agreed to by Taute in writing (Pltf's. Exh. 15), but the net effect of the advertising changes was to Taute's benefit. Under paragraph 4.F of the franchise agreement Taute was to advertise locally, spending a minimum amount of \$15 per month per car, and that Econo-Car would reimburse Taute upon receipt of proof of the local advertising to the extent of \$7.50 per month per car operated by him. This procedure was followed for the first seven months of Taute's operation through May, 1964. In May of 1964 (Tr.V.I, p.78) a new advertising approach was developed by Econo-Car to which Taute agreed in

writing. Under this approach, Econo-Car would spend \$22 per car per month, with Taute paying \$7.50 of the total amount. Thus, the net effect of this change was that Taute paid the same, but the company would then pay \$14.50 per car instead of \$7.50 as under the initial arrangement. The program was delayed slightly in being effectuated and Taute was allowed to revert to the former arrangements for the month of June, 1964. The new arrangement was in effect during the months of July and August, 1964.

The advertising arrangements were again changed in the fall of 1964 to provide that Econo-Car would pay \$22 per month per car on the basis of 75% of the local dealer's fleet. (Tr. V.I, p.84). The net effect of this arrangement would be that a total of \$16.50 would be spent on local advertising by Econo-Car International, Inc. of which \$7.50 would be paid by Taute and \$9 by the company. Thus, even under this arrangement the company was paying \$1.50 per month per car more than it had agreed to under the initial agreement. Advertising was suspended for the month of September, 1964, but the amounts expended by the company on advertising subsequent thereto more than made up for the deficit. In fact, during the period from July, 1964 through December, 1964, a little bit more than \$22 per car per month had been spent on advertising. (Tr.V.II, pp. 221-222). Thus, Taute was spending \$7.50 and the company was spending \$14.50 per month, a total of \$7 per month more than they were required to under the original contract. Taute further testified that the total spent during that period there was enough to make up for the deficit for not having had any

advertisement during the month of September. (Tr.V.II, p.223).

The Court was clearly and obviously correct in ruling as a matter of law that the defendant had not breached the contract with respect to the advertising clauses and that plaintiff had suffered no damages in connection with the advertising.

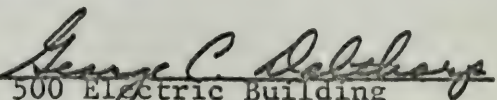
SUMMARY AND CONCLUSION

The theory of the Court's instructions to the jury on the measure of damages allowable for breach of contract was correct. This theory was that plaintiff would be entitled to all damages proximately caused by any breach of defendant limited by what plaintiff would have received had there been full performance. Defendant does contend that the Court invaded the province of the jury in its instruction that the \$5 increase in rental payments brought on by the increase in insurance premium to it was a breach of the contract.

The trial court should be affirmed on the theory of its damage instructions on the breach of contract claim, but the judgment on plaintiff's first claim should be reduced by the sum of \$607.00, the sum allocable to the \$5 increase in rental payments as of January 1, 1964.

Respectfully submitted,

CROWLEY, KILBOURNE, HAUGHEY,
HANSON & GALLAGHER

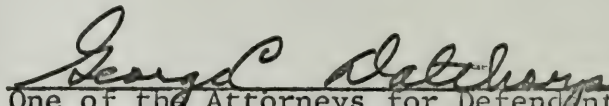
By 
500 Electric Building
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Attorneys for Defendant and
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Inc.

CERTIFICATE OF MAILING

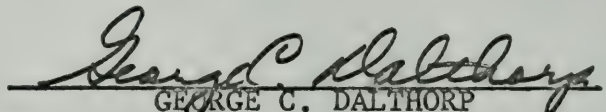
I hereby certify that on the 1st day of May, 1968, I deposited in the Post Office at Billings, Montana in an envelope securely sealed, with postage thereon prepaid, and addressed to:

John C. Sheehy, Esquire
Hutton, Schiltz & Sheehy
Attorneys at Law
Electric Building
Billings, Montana 59101,

true and correct copies of the foregoing Brief of Defendant Econo-Car International, Inc. Answering Brief of Plaintiff Carl M. Taute.


One of the Attorneys for Defendant and
Appellant Econo-Car International, Inc.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


GEORGE C. DALTHORP
Attorney

NO. 22535 & 22535-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF APPELLANT ECONO-CAR INTERNATIONAL, INC. IN REPLY
TO ANSWERING BRIEF OF APPELLEE CARL M. TAUTE

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ARGUMENT

A. Admissibility of Oral Representations on Plaintiff's Fraud Claim

We will summarize the applicable principles of law as well as reply to Taute's argument with respect to the question of the admissibility of the oral representations on the fraud claim.

The alleged oral representations were inadmissible under the following rules:

1. The execution of a contract in writing supersedes all oral negotiations concerning its subject matter which preceded or accompanied the execution of the contract. R.C.M. 1947, § 13-607.
2. When the terms of an agreement have been reduced to writing, it is to be considered as containing all those terms and therefore there can be no evidence of the terms of the agreement other than the contents of the writing. R.C.M. 1947, § 93-401-13.
3. False oral promises or representations alleged to have induced a party to enter into a contract are not admissible if they relate to matters contained in the agreement. Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873 (1909); Armington v. Stelle, 27 Mont. 13, 69 Pac. 115 (1902); Continental

Oil Co. v. Bell, 94 Mont. 123, 21 P.2d 65 (1933).

4. The parol evidence rule prohibits the reception of oral promises or agreements made prior to or contemporaneously with the execution of a written contract, which contradict, change, add to, or subtract from the express terms of the contract. This rule is applicable to oral negotiations which vary the legal construction and import of a written contract, although they may not contradict its express terms. Riddell v. Peck-Williamson Heating & Vent. Co., 27 Mont. 44, 69 Pac. 241 (1902).
5. The test as to when parol evidence varies, adds to, or contradicts a written contract is whether the "particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element." Hosch v. Howe, 92 Mont. 405, 16 P.2d 699 (1932), quoting Professor Wigmore.

We submit that the alleged oral representations here fall squarely within the purview of the above rules and are inadmis-

sible for any purpose.

Taute contends that the oral representations are admissible to explain indefinite, vague or ambiguous provisions of the agreement. In response to this assertion, we wish to point out that the language of the contract is not ambiguous. Even as to the much maligned word "guidance", the meaning of which is rather obvious and well known, the contract goes to considerable length to spell out what would be done in the nature of "guidance". If this contract needs explaining in the manner contended for, then any and all contracts need and could be legally explained, varied and added to by oral or extrinsic evidence. Additionally, even assuming for the purposes of argument that certain provisions of the contract are ambiguous, the alleged oral representations go beyond their function and serve to add to, vary and alter the express terms of the contract. For example, how could one possibly read into the language of the contract or offer as an explanation of the language of the contract, a promise by Econo-Car to spend "every cent" of the \$6,000.00 franchise fee in getting the operation going? Or, how can it be said that the alleged promise to run three full page newspaper ads does not add to the provision in the agreement that "ECONO-CAR places and runs at its own expense ads in the ECONO-DEALERS' newspaper to prepare the area for the new ECONO-DEALER"? It is significant to recall that Taute is not contending in this connection that the contract as written was not performed, but only that what Taute said that Burko said before the contract was signed was not performed.

Taute cites four Montana cases to support his position that the alleged oral misrepresentations were admissible. It is not possible to reconcile in all respects the cases cited by Taute with the overwhelming number of Montana cases excluding evidence of oral representations or oral promises under circumstances similar or analogous to the instant case discussed on pages 25 to 29 and 45 to 48 of Econo-Car's opening brief. It is possible, however, to show how even the four cases cited by Taute do not support his position here. Taute's four cases are:

Hillman v. Luzon Cafe Co., 49 Mont. 180,
142 Pac. 641 (1914);

Koch v. Rhodes, 57 Mont. 447, 188 Pac.
933 (1920);

New Home Sewing Machine Co. v. Songer,
91 Mont. 127, 7 P.2d 238;

McNussen v. Graybeal, 146 Mont. 173, 405
P.2d 447 (1965).

Only two of these cases involve claims of fraud, Hillman v. Luzon and Koch v. Rhodes. These are cases in which the alleged misrepresentations made were not only statements of existing facts (as opposed to promises as to the future performance of a party to the contract), but also were in the nature of guarantees, warranties or affirmative representations as to the quality of the subject of contracts for sale. In Koch v. Rhodes, 188 Pac. 933, *supra*, the representations were (1) that the real estate involved in the sales transaction contained 158 acres, instead of 117 acres as subsequently was discovered, (2) that timber claims across the river contained 80 acres of bottom land and good pasturage, whereas it was actually a mountainside

covered with slide rock with little or no bottom land or pasturage, and (3) that the vendor had cut over 200 tons of hay each year in the past which turned out to be a falsity. In Hillman v. Luzon, 142 Pac. 641, supra, the item being sold was a gasoline lighting machine and the oral representation admitted was that the machine was capable of running all night without being refilled, which was false.

These false representations of existing facts, in the nature of guarantees or warranties, present quite a different issue than here in Taute v. Econo-Car where the principal alleged misrepresentations being complained of are promises of performance in the future above and beyond those contained in the agreement itself.

Plaintiff's case McNussen v. Graybeal, 405 P.2d 447, supra, was strictly breach of contract case in which parol evidence was admitted to explain an ambiguous term which was not explained in the contract and which required extrinsic evidence to determine the true meaning. The court determined that the words "all milk" in the contract were ambiguous in that it could not be determined whether they meant that the defendant milk processor was required to buy all milk produced by plaintiff dairy producers (an output contract) or whether it meant that a specified price was to be paid for all milk required by defendant milk processor (a requirement contract). The court held that to determine this question it would be necessary to take evidence of all of the circumstances surrounding and preceding the signing of the contract. In New Home Sewing Machine Co. v. Songer, 7 P.2d 238, supra, the term "Finance Plan" was

held to be ambiguous because of one of a party's contention that it was a trade name used by the vendor meaning that the vendor would send representatives to sell machines at retail and give 7 lessons to each retail purchaser thereof. This case too, of course, was strictly a breach of contract case and the court admitted the evidence on the grounds that extrinsic evidence was required to explain what the parties understood the term to mean, but particularly emphasizing that it was obvious that the contract did not contain all of the terms of that particular contract.

In Hillman v. Luzon, 142 Pac. 641, *supra*, in addition to the representations being statements of existing facts in the nature of warranties or guarantees, the contract also had an ambiguity. The contract provided that the seller guaranteed that the machine was capable of doing first class work "up to claims". Nowhere in the contract was any explanation made of what the claims were. As a part of its reason for admitting parol evidence the court pointed out that parol evidence was necessary to explain the meaning of the phrase "up to claims" without which explanation the phrase would be meaningless. This case has an additional interesting aspect with respect to Econo-Car's position here for the court also held that it was reversible error to admit parol evidence that the vendor had represented that the lighting plant was capable of furnishing the light required by the vendee at an operating cost of not to exceed \$35.00 per month, whereas the actual cost of its operation was double that amount. The court stated:

"The contract contains no such warranty and the pleadings allege no such representation. The only suggestion of any such thing is the averment of a representation that the plant 'could be run at a given expense for a given length of time', but this is obviously inadequate to raise any issue." 49 Mont. at 185.

Thus the court in Hillman v. Luzon Cafe Co., 142 Pac. 641, supra, clearly acknowledged the necessity in a fraud case of pleading and proving all elements of fraud. We again point out to the court that probably the most important alleged fraudulent oral misrepresentation in the instant case was that "every cent" of the \$6,000.00 franchise fee would be spent in getting the operation going, and that this alleged misrepresentation had not been pleaded or referred to in any of Taute's pre-trial statements of position.

B.. Failure of Proof of Necessary Elements of Fraud

Taute has failed to indicate where in the record there is any evidence to prove that the alleged oral promises, if admissible, were made with no intention of performing them. This is a most essential element of plaintiff's fraud claim. At most, Taute's evidence can be taken to show that oral promises were made. But proof that a promise is made and then not carried out is no proof that it was made with no intention to perform. Reilly v. Maw, 146 Mont. 145, 405 P.2d 440 (1965). Nor can fraud be presumed. Rather, good faith is presumed and fraud must be proved. Cuckovich v. Buckovich, 82 Mont. 1, 264 Pac. 930 (1928).

Taute further failed to indicate where in the record

there is any evidence that plaintiff relied upon the statements alleged to have been made. In fact, Taute's actions, including his proceeding under the contract, his statements that he had no one to blame but himself and his letters showed his utter lack of reliance on the alleged representations.

Plaintiff's claim for fraud should fail for these reasons alone.

C. Waiver of Fraud

Taute's counsel has failed to perceive, or has ignored, the thrust of defendant's argument that Taute waived any right he may have had to sue for damages for fraud, saying only that Taute waived his right to rescind, but not his right to sue for damages for fraud. Under the facts of this case Taute waived, as a matter of law, not only his right to rescind, but also his right to recover damages for fraud.

It is undisputed that Taute knew of the falsity of the oral representations nearly two months before he either commenced operations or quit his prior job. At that time the agreement was almost wholly executory and could have been rescinded without trauma to either party. Instead, Taute, with full knowledge, deliberately elected to go ahead and take his chances. At a time when he could easily have rescinded, he elected to proceed under the contract as written, and, we believe at the same time under the circumstances here, waived his right to recover any damages for fraud.

As stated in the very case most heavily relied upon by Taute, a party to an executory contract procured by fraud

"may, after discovering the fraud, either perform it or rescind it; and if, with knowledge of the fraud, he elects to perform it, this is equivalent to his making a new contract, and to permit him under those circumstances to recover for fraud would be to do violence to every rule upon which compensatory damages are allowed." Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933, 937, 938 (1920). When Taute, with knowledge that the alleged oral promises would not be performed, went ahead and performed the contract, he in effect made a "new" contract under the rule in Koch v. Rhodes, *supra*, and was then barred from recovery under the "old" contract. (Ironically, the "new" contract was the "old" contract as written, unmodified by the alleged oral promises.) And in Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911) the court said that "the substitution of the new contract for the old amounted to a waiver of the fraud which entered into the execution of the old one." (115 Pac. at p. 39).

Taute did other things which showed that when he elected to go ahead he was affirming the contract as it was then understood (as well as originally written) and waiving the right to damages for fraud in the inducement under the above rule. For example, he signed Exhibit 7, he accepted changes in rates, he agreed to advertising changes, he asked for assistance and favors, all of which are inconsistent with his retaining the right to sue for fraud in the inducement. "(W)hen a party claiming to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he is deemed to have waived any claim for

damages on account of the fraud. . . . 'If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages. . . he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.'" Schied v. Bodinson Mfg. Co. Cal.App. 1947, 179 P.2d 380, 385.

Taute waived any fraud.

D. Cost of Insurance

In Taute's answering brief, page 23, the statement is made that "when Chrysler Leasing reduced its rates to Econo-Car, Econo-Car in turn passed that reduction onto Taute." There is absolutely no basis in the record, or anywhere else as far as we know, for this statement that Chrysler Leasing reduced its rates to Econo-Car. This issue has arisen because of the court's instruction to the jury that unless they concluded that Taute agreed to the increase, the increase of \$5.00 per month per car for insurance cost, commencing January 1, 1964, was a breach of the franchise agreement and that Taute should be compensated therefor. To summarize again this aspect of the case, Taute was required to make one payment per month per car to Econo-Car which payment covered the cost to Econo-Car of the insurance Coverage, the rent of the automobile itself, and presumably Econo-Car's overhead and administrative expenses.

Taking a typical transaction, a Valiant under the original rate schedule cost Taute \$129.00 per month. Econo-Car reduced this rate to \$118.00 per month as of December 1, 1963, and increased

it to \$123.00 per month as of January 1, 1964, the increase being required by the increase in liability insurance premiums which Econo-Car was required to make. Both before and after these rate changes, Taute made only one payment per month to Econo-Car, which payment included all of the charges for his use of the automobiles, including the insurance. It is extremely difficult to see how Econo-Car could be said to have breached the franchise agreement with respect to these rates when at a point two and one-half months after Taute's grand opening Taute was having to pay Econo-Car \$6.00 per month less per car than he had originally agreed to pay. That the Court's conclusion that this as a matter of law was a breach of the contract is patently erroneous.

SUMMARY

As a summary of argument on all points, we are setting forth the language of the major headings of Appellant Econo-Car's opening brief argument with the page numbers where each topic may be found therein.

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CONCLUSION

The verdict and judgment on Taute's claim for fraud, the second claim, should be reversed and a judgment rendered for defendant Econo-Car International, Inc. thereon. The verdict and judgment for plaintiff Taute on his first claim, the breach of contract claim, should be reduced by the sum of \$607.00, the sum allocable to the \$5.00 increase in rental payments as of January 1, 1964, and otherwise affirmed.

Respectfully submitted.

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CERTIFICATE OF MAILING

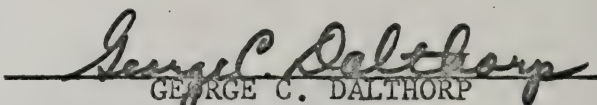
I hereby certify that on the 20th day of May, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, and addressed to:

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true and correct copies of the foregoing Brief of Appellant Econo-Car International, Inc. in Reply to Answering Brief of Appellee Carl M. Taute.

George C. Schiltz
One of the Attorneys for Defendant
and Appellant Econo-Car International,
Inc.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIKE R. PARGA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

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APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On August 2, 1967, the appellant was indicted in three counts by the Federal Grand Jury for the Central District of California, for the transportation and facilitation of 100 kilograms of marihuana, its sale, and its transfer without receiving an order form, in violation of Title 21, United States Code, Section 176a, and Title 26, United States Code, Section 4742(a) [C. T. 1].^{1/} Following a court trial before the Honorable Charles H. Carr, United States District Judge, on October 24, and 25, 1967, Parga was

^{1/} "C. T. " refers to Clerk's Transcript.

found guilty of Count One of the Indictment, transportation and facilitation of marihuana, and on November 20, 1967, he was sentenced to the custody of the Attorney General for 10 years [C. T. 24]. After the Government announced it would not proceed on Counts 2 and 3 a motion for acquittal was granted as to those counts.

There was a notice of appeal filed on November 22, 1967 [C. T. 25].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231, Title 21, United States Code, Section 176a, and Title 26, United States Code, Section 4742(a).

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

APPLICABLE STATUTES

Title 21, United States Code, Section 176a provides as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the

transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26, United States Code, Section 4742(a) provides as follows:

"(a) General requirement -- It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

QUESTION PRESENTED

Whether the evidence was sufficient to sustain conviction as to Count One.

IV

STATEMENT OF FACTS

On May 15, 1967, Los Angeles Deputy Sheriff Delia Waddle, met with Mike R. Parga and an informant of the Sheriff's Office at a junk yard in Gardena, California [R. T. 27-29]. ^{2/} At the junk yard the informant gave Parga \$85 which Waddle had given the informant a few minutes before [R. T. 31]. Parga stated he did not have any marihuana with him at that time and he would have to go to his residence to pick it up [R. T. 32]. The three proceeded to Parga's home [R. T. 33].

On the way to Parga's home, Waddle stated that she "wanted to make a future purchase of approximately 100 kilos of marihuana. I asked Mr. Parga if he could get this for me and he said yes, that he could get in unlimited amounts. The amount was not in issue." [R. T. 33].

Upon arriving at Parga's residence, Parga asked Waddle and the informant to wait in the living room [R. T. 33]. Parga

^{2/} "R. T." refers to Reporter's Transcript

returned to the living room and handed Waddle a package which she determined was marihuana [R. T. 34-35].

Following the transfer of the marihuana, on the return trip to the junk yard, Waddle asked Parga how the marihuana was obtained [R. T. 36]. Parga related the following:

" . . . I had a conversation in substance with Mr. Parga relating how we -- the marihuana was brought across the border, and I made the statement that wasn't it easy to get caught, and Mr. Parga made the statement that if the person didn't know that they were carrying it they wouldn't be nervous or jittery about it and therefore would not have a nervous attitude.

"I then asked him, 'Well, how would you do that?'

"He continued to relate to me a form that it was done in the way he said that we take numerous cars and trucks across the border, and with numerous drivers, and he said the drivers do not know who is going to be driving it back or who is going to have it in their automobiles, and in this way there wouldn't be reason for someone to be nervous or jittery, because they wouldn't know that it was in their automobile.

"He said that they had done this in the past, that it had worked, and that they -- and that they would be doing it again shortly, that they had some buried

heroin across the border that they were going to pick up before too long and that they would be going down to do it." [R. T. 36-37].

Upon returning to the junk yard Waddle asked Parga how she would contact him for the future purchase [R. T. 38]. Parga said she could call him when she had gotten the money [R. T. 38].

On May 25, 1967, Waddle met with Parga and said she had not been able to acquire the money for the kilos [R. T. 40]. When she asked if everything was "still go" he said yes and that "they had gone through 27 kilos that week" [R. T. 40-41].

Between May 25th and June 27th, the date in the indictment, Waddle had a number of phone conversations with Parga [R. T. 41, 43, 59-60].

On June 27, 1967, Los Angeles Deputy Sheriff Ramon Velasquez went with the informant to the Horseshoe Club in Gardena, California, at approximately 8:00 P. M. [R. T. 67]. Later defendants Bonney and Parga joined them [R. T. 67-69]. The informant introduced Parga to Velasquez and then Parga introduced Bonney to Velasquez [R. T. 69].

After a brief conversation relative to other matters, Parga stated, "let's get down to business." [R. T. 70]. When Velasquez asked how the transaction was to be consummated Bonney said the four men would leave and go to a garage where he and Parga would

load the deputy's car [R. T. 70]. "As soon as I was satisfied that there were 100 kilos of marihuana in there, I would pay Mr. Parga, that he [Bonney] did not want to touch the money, that the money was to go to Mr. Parga." [R. T. 70]. When Velasquez objected to the arrangement because he wasn't going to take \$6,500 "anyplace", Bonney decided to get it by himself [R. T. 70-71]. Bonney told Velasquez, the informant, and Parga to wait for him at the Kings Inn, next door to the Horseshoe Club [R. T. 71]. Velasquez then gave Bonney the keys to his car and watched Bonney drive south on Vermont Avenue [R. T. 72].

Velasquez, Parga and the informant proceeded to the Kings Inn where Parga related the following:

"We initially had a conversation with Mr. Parga where he told me that they took care of business the right way. If the 100 kilos was short in any way, one or two kilos short, to call them or him and he would make the short amount good.

"We also had another conversation with regards to Mr. Bonney losing \$5,000 the prior month and also an amount of two tons of marihuana someplace in Mexico. . . ." [R. T. 73].

Eldon G. Burkett, of the Los Angeles County Sheriff's Office followed Bonney and saw Bonney and Adolfo Carbajal, the third defendant, load marihuana into Velasquez' car and return it to the Kings Inn [R. T. 95-102].

At approximately 10:00 P. M. , Bonney appeared at the Kings Inn [R. T. 74], and Bonney asked Parga if he [Parga] had seen the money [R. T. 76]. When Parga answered in the negative, Velasquez said the narcotics would have to be seen before the \$6,500 would be paid [R. T. 76]. Bonney and the informant then went out to the car [R. T. 76]. In fifteen minutes the pair reappeared [R. T. 76], the informant gave a prearranged signal, and Parga and Bonney were arrested [R. T. 77].

Velasquez later went to his vehicle, opened the trunk, and found seven cardboard boxes of marihuana wrapped in differently colored paper packages [R. T. 78; Exs. 2, 3, 4, 5, 6, 7; Stipulation at R. T. 82; Stipulation at R. T. 83].

V

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE CONVICTION

A judgment of conviction must be sustained if, taking the view most favorable to the Government, there is substantial evidence to support it.

Glasser v. United States, 315 U. S. 60, 80 (1942);

Nye & Nissen v. United States, 168 F. 2d 846

(9th Cir. 1948), aff 'd. 336 U. S. 613 (1949).

Appellant's position on this appeal is that the Government failed to prove that Parga had possession, either actual or

constructive, of the marihuana in question and, therefore, the presumption of illegal importation and knowledge thereof was not a part of this case.

Initially, the conviction can be sustained without any reference to the "presumption" if the evidence shows that Parga knew the marihuana was illegally imported. Appellant, in his brief, places reliance on Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962). Hernandez, at 124, says that its holding "does not concern those whose knowledge of the illegal importation of the narcotic drugs can be shown by direct or circumstantial evidence, without reliance upon the presumption based upon possession . . . The rule which we announce relates only to that defendant who is not shown, directly or by circumstantial proof, to have had knowledge of the source of the narcotic drugs, or to have had their physical custody, and whose role in the scheme, if any, is so minor as not to support an inference that he shared in the control of the narcotic drugs. . . ."

In Hernandez the trial court found "there was no proof that the defendant personally had knowledge that the heroin was illegally imported and no proof that defendant personally had possession of the narcotics from which such knowledge could be presumed," 300 F.2d at 120.

In the instant case, Parga had, as shown by the evidence, both actual knowledge of the illegal importation of the marihuana and constructive possession of it. Parga knew that the marihuana was smuggled in from Mexico by his explanation of his practice

and procedure. Judge Carr's finding of guilt is based, in part, on the testimony of Delia Waddle relative to Parga's statement of the "defendant bringing in this marihuana from Mexico" [R. T. 183].

The presumption of Section 176a does apply to the instant case. Parga had constructive possession by virtue of his ability to deliver marihuana as he said he could. The fact is that he produced the marihuana at this time and place promised, even though he did not physically drive it to the spot. It is to be noted that it was only because of Deputy Velasquez' protestations that Parga did not load his car with the marihuana.

In Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960), the same Deputy Sheriff Velasquez was involved. In that case this Court said, "Where a defendant negotiates a sale and receives the purchase price, he has possession through dominion and control, even though delivery is made by another and there is no evidence the seller ever had actual possession" 276 F. 2d at 95. In the present case Parga negotiated the sale and was to receive the money except for the fact the arrest took place just prior thereto.

Appellant relies on Williams v. United States, 290 F. 2d 451 (9th Cir. 1961) to show lack of possession in the instant case. In a discussion of Williams by the Ninth Circuit in Brothers v. United States, 328 F. 2d 151 (9th Cir. 1964), the following appears, at 156:

"In holding that, under this testimony, Williams was not shown to have constructive possession of the narcotics in the refuse can,

the court emphasized the fact that no sale of narcotics between McCormick and Williams had been arranged. Williams the court said, was only contemplating entering into a partnership with the informer for the future sale of narcotics to third persons. 'We have no doubt,' this court said, 'the appellant either had dealt, or planned to deal in the future, in marijuana. But that does not prove possession of the two kilograms of marijuana on July 20, 1959, the date charged. 290 F. 2d at 453. The court, in Williams expressly reaffirmed the holdings of this court in Rodella v. United States, supra.

"The Williams case, therefore, is distinguishable from the case before us, where effective dominion and control was exercised over the narcotics as a means of consummating a sale already arranged. We hold that, here, the evidence of constructive possession of the narcotic drugs was adequate to warrant application of section 174 presumption."

In the instant case it is legally insignificant that the money, as planned, was not handed to Parga, or that the presumption of Section 176a rather than Section 174 is involved.

The evidence shows not only knowledge on Parga's part, but also his joint possession with Bonney and his power to control it by having it delivered as he said he could.

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 22537

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HALDEMAN PIPE & SUPPLY COMPANY, a corporation,
Debtor.

On Appeal From the United States District Court of the
Central District of California.

APPELLANT'S OPENING BRIEF.

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FILED

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HALDEMAN PIPE & SUPPLY COMPANY, a corporation,
Debtor.

On Appeal From the United States District Court of the
Central District of California.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal by an Attorney for a Receiver in a proceeding under Chapter XI of the Bankruptcy Act. The appeal is from an Order of the Bankruptcy Referee—as affirmed by the District Court—denying all compensation for legal services rendered to the Receiver in the course of the said proceeding.

The Referee's jurisdiction to set the fee rests on Section 38(6) of the Bankruptcy Act (11 U.S.C. Section 66).

The District Court's jurisdiction to review the Order of the Referee rests on Section 39(c) of the Bankruptcy Act (11 U.S.C. Section 67).

This Court's jurisdiction rests on Section 24(a) of the Bankruptcy Act (11 U.S.C. Section 47).

Statement of the Case.

The within proceeding was filed under the provisions of Chapter XI, Section 322, of the Bankruptcy Act on May 31, 1963.

A. J. Bumb was appointed Receiver on the same date, and Appellant was employed as Attorney for the Receiver by an Order made and entered on June 6, 1963.

Thereafter, Appellant performed extensive legal services on behalf of the Receiver in a variety of matters for a period of approximately three years.

Following the filing of an Application for Compensation by Appellant, an Order was made and entered on June 15, 1967, which denied to Appellant any compensation for the services he had rendered on the ground that he had represented a general creditor whose claim was guaranteed by the principal shareholders of the corporate debtor, and as a result there was the possibility of a conflict of interest when the Receiver later attempted to recover assets from such principals on behalf of the corporate debtor.

Said Order recites that the fair and reasonable value of the services rendered to the Receiver by Appellant is the sum of \$12,500.00. However, the Referee in Bankruptcy found that Appellant had failed to comply with the requirements of General Order 44, and as a result, the Court was required to disallow the entire compensation to which Appellant might otherwise be entitled.

On July 3, 1967, being within an extended time fixed by the Court, Appellant filed a Petition for Review of that portion of said Order disallowing all compensation. On August 16, 1967, the Referee filed his Certificate on Petition for Review.

On October 31, 1967, the United States District Court entered its Order Affirming the Order of the

Referee in Bankruptcy, approving and adopting the Referee's Findings of Fact and Conclusions of Law filed in connection therewith, and dismissing the Petition for Review.

On November 14, 1967, Appellant filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the District Court's Order.

Statement of the Facts.

On May 28, 1963, Appellant received a telephone call from Chicago from one William Collen (hereinafter referred to as "Collen"). Collen was an attorney in the firm of Collen, Kessler and Kadison, who represented Manufacturers Clearing House and who, as a result, represented approximately ten creditors of Haldeman Pipe & Supply Company, a California corporation (hereinafter referred to as "Haldeman").

Prior to the aforementioned telephone call, and on May 24, 1963, Collen had been present at a meeting of Haldeman's larger creditors, which was held in Los Angeles. Haldeman had been having difficulties in meeting its obligations, and the purpose of the meeting was to work out a settlement arrangement. At that time, one Leonard Goldman, an attorney in Los Angeles, was representing Haldeman.

During the aforementioned phone call, Collen told Appellant the name of the creditors whom he represented, and asked if Appellant would represent them locally as he could not keep running out to Los Angeles in order to keep track of the status of the negotiations.

Appellant agreed with Collen to undertake such representation and, per Collen's request, placed a call to Goldman in order to ascertain the posture of the proposed settlement arrangements. During this phone con-

versation, Goldman mentioned that there were difficulties in working out the proposed settlement arrangement, that he remembered Collen as representing a substantial number of creditors, and now that Appellant represented said creditors, he would keep Appellant posted.

On or about May 30, 1963, Goldman called Appellant and indicated that he intended to file on behalf of Haldeman a Petition under Chapter XI of the Bankruptcy Act. He further stated that it would be in the best interest of all of the creditors if Haldeman continued in operation by means of a Receiver. Goldman indicated that, since Appellant apparently represented major creditors of Haldeman, Appellant would be well advised to accompany him and discuss the matter with the Referee to whom the case would be referred.

On May 31, 1963, Goldman filed the Petition under Chapter XI, and immediately thereafter on the same day, along with Appellant, met with the Hon. Russell B. Seymour, the Referee to whom the matter was referred. During the course of said meeting, Referee Seymour called A. J. Bumb and requested him to act as Receiver for the estate. Mr. Bumb consented and was thereupon immediately appointed. Mr. Bumb asked the name of the attorney representing some of the larger creditors, and when Appellant was mentioned, requested that Appellant prepare an application for his employment as counsel for the Receiver.

The major portion of the meeting was spent discussing, in a general way, the problems involved in the proceeding. As Appellant had not known Collen prior to the telephone conversation on May 28, 1963, and had never represented, prior to that time, any of the creditors referred to him by Collen, Appellant's knowledge of the problems involved was extremely limited.

Subsequently, on May 31, 1963, Appellant prepared an Application for the signature of the Receiver, for an Order authorizing the Receiver to employ Appellant as his counsel, as well as an Affidavit signed and sworn to by Appellant, which Affidavit recites, *inter alia*, the following:

“That affiant represents certain unsecured creditors whose interest, so far as known to affiant, are identical to those of the Receiver herein; that affiant does not represent any interest which is adverse to the Receiver or to the creditors herein. . . .”

On May 31, 1963, Appellant mailed the Application, including his Affidavit, to the Receiver for his signature. On June 4, 1963, Appellant received a second telephone call from Collen in Chicago, in the course of which Collen informed Appellant that one of the creditors which he had referred held a personal guarantee of its claim by Jack Manildi (hereinafter referred to as “Manildi”), who was the President and principal shareholder of Haldeman. Collen stated that he did not know whether Mrs. Manildi had signed the guarantee in that he did not have it in his possession, but that he would endeavor to obtain it.

During said call, Collen requested Appellant to file an action on the guarantee at the earliest possible moment, and in connection therewith, to promptly levy attachments on certain parcels of real property standing in the name of Manildi, in that he had heard that certain other creditors of Haldeman also held personal guarantees executed by Manildi, and that one such creditor had already attached.

Subsequent to the aforementioned phone conversation, and on the same day, Appellant reported and stated to the Receiver in the presence of Goldman that

one of the creditors he represented held a personal guarantee executed by Manildi.

The following day, on June 5, 1963, Collen sent a letter to Appellant, which included a copy of the guarantee, which in fact was executed by both Mr. and Mrs. Manildi.

As was previously mentioned, on June 6, 1963, an Order was entered authorizing the employment of Appellant as counsel for the Receiver. On or about June 8, 1963, Appellant received Collen's letter, including the copy of the guarantee, and proceeded to draft a Complaint against the Manildis and the necessary documents to effectuate an attachment of real property standing in their names. This Complaint was filed on June 10, 1963, and the levies of attachment were made shortly thereafter.

Prior to Appellant's employment as counsel for the Receiver, and during the meeting held with Referee Seymour on May 31, 1963, Appellant was informed by Goldman that an account receivable existed in favor of Haldeman and against a corporation known as Santa Monica Plumbing & Supply Co. (hereafter referred to as "Santa Monica"), and that Haldeman and Santa Monica were related corporations.

Subsequently, and during the course of the Receiver's administration, rumors arose that other claims against Santa Monica might exist in favor of Haldeman. In order to substantiate or dismiss these assertions, shortly prior to July 26, 1963, the Receiver suggested that Appellant prepare an Application for an Order authorizing the employment of an auditor to investigate, among other things, transfers between Santa Monica, Manildi and Haldeman. On July 29, 1963, an Order was entered based on said Application authorizing the Receiver's employment of one Albert Kramer (hereinafter

referred to as "Kramer"), for the purposes set forth hereinabove.

On August 19, 1963, a conference was held attended by Kramer, the Receiver, Appellant, and Hubert F. Laugharn (hereinafter referred to as "Laugharn"), who was attorney for a Court-appointed Unsecured Creditors' Committee. Kramer orally reported that in his opinion it appeared likely that Haldeman had claims against Santa Monica and, although he had not completed his investigation at that point, his suspicions were aroused as to whether there also might be claims against the Manildis individually. According to Kramer, these suspicions against the Manildis were sufficient to warrant proceeding with further investigation.

Immediately following the aforementioned meeting, Appellant conferred with the Receiver. At that time, neither the Receiver nor Appellant knew whether claims would actually develop against the Manildis. However, due to the fact that Appellant represented a general creditor whose claim was guaranteed by the Manildis, it was agreed that the Receiver should have independent advice as to the nature and validity of those claims.

Thereafter, and on or about August 30, 1963, the Court authorized the Receiver to employ Laugharn as Special Counsel to

"[p]ursue and conclude the said [Kramer's] investigations and, should the facts so warrant to institute in the name of the Receiver as plaintiff, appropriate proceedings to recover any assets or sums of money which the debtor and/or the Receiver may be entitled to receive from Santa Monica Plumbing Supply Company and Jack Manildi and Vina Gale Manildi." [Clerk's Record, p. 54.]

At or about the time Appellant filed the Complaint on the guarantee on June 10, 1963, several other creditors of Haldeman, whose claims were also guaranteed by the Manildis, were attempting to levy on the same real property. As a result of this "race" to attach, none of the guaranteed creditors was absolutely sure of the priority of its levy. As a result, in the latter part of June, 1963, negotiations were commenced between the guaranteed creditors, including the one represented by Appellant, which ultimately resulted in the creation of a "Guaranteed Creditors Trust" (hereinafter called the "Leland Trust").

The real property which had been attached by some or all of the guaranteed creditors became the corpus of this trust, and the Manildis were relieved from further liability under their guarantees, despite the fact that they owned other substantial assets which were not included in the trust corpus. Furthermore, as Kramer had raised the possibility that the Manildis might be liable to Haldeman, the effectiveness of the Leland Trust was conditioned on Court approval.

On September 23, 1963, Laugharn representing the votes necessary to constitute a majority in number and amount voted in favor of a Plan of Arrangement which had the effect of relinquishing any rights the Receiver may have had in the real property constituting the corpus of the Leland Trust. On September 27, 1963, the Referee made and entered his Order confirming said Plan of Arrangement. Laugharn, as Special Counsel for the Receiver, had previously thereto on September 23, 1963, filed an action against Santa Monica and the Manildis.

This litigation was settled and compromised by the payment by Santa Monica to the Receiver of the sum of \$32,000. This sum was paid from Santa Monica's

accounts receivable, which had been collected and impounded in a special trust account, and the balance in said account was released to Santa Monica. No part of the settlement sum was paid by the Manildis individually, nor have they ever been adjudicated bankrupt.

Specification of Errors.

1. The Referee and the District Court erred in holding:

- (a) That there was a possibility that appellant knew of the existence of the guarantee, or that he had discussed the matter of a suit against Manildis prior to June 4, 1963. [Finding of Fact 7.] By finding that appellant knew other facts, excepting possibly the ones recited above, as of May 31, 1963, the court erroneously creates the inference that evidence was presented which would in some way support such speculation. There is no such evidence.
- (b) That at least some of the real property upon which appellant caused attachments to be levied was subsequently sought to be recovered by the receiver in his Superior Court Action No. 825 741. [Finding of Fact 10.] The real property upon which appellant caused attachments to be levied became part of the corpus of the "Leland Trust". [Finding of Fact 16.] The effectiveness of this trust was recognized and approved by the court's order of September 27, 1963 [Finding of Fact 17], which order also reserved to the receiver the causes of action asserted in Superior Court Action No. 825741. [Finding of Fact 17.] It is logically inconsistent for the court to find that it authorized the receiver to attempt to recover certain real property (upon which appellant caused attach-

ments to be levied), and at the time of granting the receiver such authorization, also approved the setting aside of this same real property in a trust, beyond the receiver's reach. While the receiver may have been authorized by the court to attempt to recover real property standing in the name of the Manildis, such real property could never have been the real property upon which appellant had caused attachments to be levied.

- (c) That following the meeting with the accountant (Kramer) on August 19, 1963, appellant "*for the first time*," (Emphasis the court's) notified the receiver that he had sued the Manildis and attached real property standing in their names on behalf of a general creditors, which had the Manildis' guarantee. [Finding of Fact 13.] There is no evidence to support the finding that this was the "first time" appellant had informed the receiver of this suit and attachment. Exactly the opposite conclusion is indicated by other findings of fact. Finding of Fact 15 states that appellant ". . . mentioned that he represented a 'guarantee' creditor during the course of one of several hearings in connection with the first meeting of creditors. . . ."

Finding of Fact 11 states that on June 4, 1963, appellant "mentioned following a meeting at the Bank of America, that one of the creditors he represented had a personal guarantee executed by the Manildis."

Furthermore, appellant testified that he had informed the receiver of this suit and attachment on several occasions prior to the meeting on August 19, 1963, and the receiver never testified to the contrary. (In fact, the receiver never tes-

tified at any of the three hearings held before the referee in regard to this matter.)

In conclusion, there is no evidence to support the finding that appellant "for the first time" following the meeting on August 19, 1963, informed the receiver of the suit and levy of attachment referred to in Finding of Fact 13.

2. The Referee and the District Court erred in holding that there was an actual, if not yet known, conflict of interest between a receiver on one hand and a general creditor (Amstan) which holds a guarantee of its debt executed by principals of the corporate debtor. [Finding of Fact 20, Conclusion of Law 1.]

3(a). The Referee and the District Court erred in holding that on or before June 6, 1963, appellant knew that his representation of the receiver then was in substantial conflict with his representation of Amstan. [Finding of Fact 21, Conclusion of Law 2.]

(b) The Referee and the District Court erred in holding that on or before June 6, 1963, appellant "should have known" that his representation of the receiver would be, "or at least might become," in substantial conflict with his representation of Amstan. [Finding of Fact 21, Conclusion of Law 2.]

4. The Referee and the District Court erred in holding that appellant's representation of Amstan, in connection with which he sought to recover from the Manildis, was in substantial conflict with the receiver's possible right to recover from the Manildis. [Conclusion of Law 3.]

5. The Referee and the District Court erred in holding that Amstan's levy of attachment on real property standing in the name of the Manildis reduced, and militated against, the receiver's ability to effect collec-

tion of any claim or cause of action he may have had against the Manildis. [Conclusion of Law 4.]

6. The Referee and the District Court erred in holding that appellant's failure to set out in his affidavit the specific facts relating to appellant's representation of Amstan, and its claim against the Manildis, constitutes a substantial violation of, and noncompliance with the provisions of General Order 44. [Conclusion of Law 5.]

7. The Referee and the District Court erred in holding that appellant's failure to set out in his affidavit the specific facts regarding his representation of Amstan, its claims against the Manildis, and the relationships between the Manildis, Santa Monica Plumbing and Supply Co., and the corporate debtor, requires disallowance of any compensation to which appellant might otherwise be entitled as attorney for the receiver. [Conclusion of Law 5.]

Summary of Argument.

The Referee and the District Court have denied appellant all compensation for acting as attorney for a receiver on the basis of the following reasoning:

1. That appellant was not permitted to represent at the same time a receiver and several general creditors of the corporate debtor, where one of such creditors has its claim guaranteed by the principals of such debtor in that dual representation under such circumstances involves a conflict of interest which is not permitted by the Bankruptcy Act.

2. That General Order 44 required appellant to set forth in his affidavit which accompanied the application for his employment, the specific facts that one of the general creditors he represented (Amstan) held the personal guarantee of its claim by the principals of the corporate debtor, and that appellant intended to sue and

attach certain real property standing solely in the name of such principals. The Referee and the Count conclude that this information is required as a matter of law to be set forth in that appellant was required to anticipate that the principals of the corporate debtor may have been diverting corporate assets to themselves, even though no such facts were then known which would substantiate this conclusion, nor were such facts ever proved.

3. That by failing to set forth such information in his affidavit, appellant took the chance that in the event it later appeared that the receiver had a cause of action against such principals, this fact would indicate that there had existed all along an actual, even though unknown, conflict in appellant's representation of the receiver which conflict would require the court under General Order 44 to deny all fees to which he otherwise might be entitled.

In reply to this position, appellant's argument may be stated as follows:

1. That Section 44(c) of the Bankruptcy Act expressly does not disqualify an attorney from representing at the same time a receiver and several general creditors of the corporate debtor, even though one of such creditors has its claim guaranteed by the principals of such debtor.

2. That General Order 44 requires an application for the employment of counsel to set forth to the best of petitioners' knowledge, such facts as might reasonably give rise to a conflict in representation.

3. That the affidavit filed by appellant in connection with the application for his employment contains all facts known to appellant at that time which might reasonably give rise to a conflict in representation, and therefore complied with General Order 44.

4. That following appellant's undertaking of representation of the receiver, a report by an accountant indicated the possibility that the receiver might have claims against the principals of the corporate debtor. That immediately upon learning of this possibility appellant withdrew from representing the receiver in regard to his potential claim against such principals, and special counsel was appointed by the court to continue to investigate the relationship between the corporate debtor and its principals, and if such investigation should so warrant, to file suit against such principals. That subsequent thereto special counsel contended that the receiver had a cause of action against the principals and requested the court's permission to file an action against such principals and another corporate defendant on behalf of the receiver. The court granted this request, and, subsequent thereto, a settlement of the litigation was approved by the court which did not involve the payment by such principals of any part of the sum recovered.

In conclusion, appellant argues that the denial of all fees to him by the court is not justified by General Order 44 in that:

1. Appellant did not represent an interest adverse to the receiver;

2. Appellant's Affidavit filed in conjunction with the application for his employment complied with the requirements of General Order 44; and

3. To deny all fees to appellant under the circumstances of this case for his representation of the receiver would constitute an abuse of any discretion the court may be given by General Order 44.

Questions Presented.

1. Does the Bankruptcy Act prevent an attorney from representing at the same time a Receiver and several general creditors of the corporate debtor, one of whom has its claim guaranteed by the principal shareholders of such debtor?

2. Does General Order 44 require that an application for an order authorizing a Receiver to employ an attorney on a general retainer set forth the specific facts that the proposed attorney represents, among general creditors, a general creditor

- (a) whose claim is guaranteed by the principals of the corporate debtor, and
- (b) that the proposed attorney contemplates suing and attaching property standing in the name of such principals on behalf of such general creditor,

where no facts are then known which would indicate that the Receiver might have a cause of action against such principals?

3. Does General Order 44 grant to the court the discretion to disallow all fees to an attorney

- (a) where without actual knowledge of a possible conflict, an attorney represents a Receiver for a corporate debtor and also a general creditor which has its claim guaranteed by the principals of the debtor corporation,
- (b) where such attorney levies an attachment on real property on behalf of such general creditor on real property standing solely in the names of the principals of such corporate debtor,
- (c) where subsequent to undertaking such dual representation, and levy of attachment, a suspicion is raised that the corporate debtor may have a claim against such principals,

- (d) where such attorney immediately withdraws from advising the Receiver with regard to the possibility of establishing such claims and special counsel is promptly appointed to advise the Receiver in this regard,
- (e) where the real property upon which such attorney levied the attachment on behalf of the general creditor, becomes part of the corpus of a trust, and
- (f) where the court approves, with the acquiescence of such special counsel, the provisions of said trust, thereby permanently preventing the Receiver from recovering for the estate, any of the trust corpus.

4. Is it an abuse of discretion which may be given to the court in General Order 44 to deny all fees to an attorney who represents a Receiver under the circumstances set forth in Question 3 above?

ARGUMENT.

I.

Section 44(c) of the Bankruptcy Act Expressly Does Not Disqualify Appellant From Representing at the Same Time a Receiver and Several General Creditors of the Corporate Debtor, One of Whom Has Its Claim Guaranteed by the Principal Shareholders of Such Debtor.

- (1) Subdivision (c) Was Added to Section 44 to Specifically Permit an Attorney to Represent Both the Receiver and a General Creditor Where Only the Possibility of a Conflict of Interest Exists.

Section 44(c) of the Bankruptcy Act reads as follows:

“§44 *Trustees; Creditor's Committees; and Attorneys.* . . .

“(c) An attorney shall not be disqualified to act as attorney for the receiver or trustee by reason of his representation of a general creditor.”

Subdivision (c) was added to Section 44 of the Bankruptcy Act in 1938 (June 22, 1938, c. 575 §1, 52 Stat. 860), and in order to understand the reasons for the addition of this subdivision, it is necessary to undertake a brief review of the structure of the Bankruptcy Act itself and the relationship of the Act to the General Orders in Bankruptcy.

Until its repeal in 1964, Section 30 of the Bankruptcy Act authorized the Supreme Court to make all necessary rules, forms and orders *as to procedure* necessary to carry out the provisions of the Act. Generally speaking, the General Orders are not construed to add anything to the Act, but merely to aid in its execution. *West Co. v. Lea Bros. & Co.*, 174 U.S. 590, 19 S. Ct. 836, 43 L. Ed. 1098 (1899).

When it is necessary to construe a General Order, courts take into consideration the purpose to be accomplished by the Act. *Matter of L.M. Axle Co.* (C.C.A. 6 Cir.), 5 A.M.B.R. (N.S.) 734, 3 F. 2d 581 (1925); *Matter of Hodges* (D.C. Conn.), 23 A.M.B.R. (N.S.) 266, 4 F. Supp. 804 (1933), aff'd (C.C.A., 2d Cir.) 25 A.M.B.R. (N.S.) 346, 70 F. 2d 243 (1934), and, similarly, where a General Order is amended, the previous Order should be studied with the amended Order to determine the purpose of the amendment. *Matter of Hodges* (D.C. Conn.), 23 A.M.B.R. (N.S.) 266, 4 F. Supp. 804 (1933), aff'd (C.C.A., 2d Cir.) 25 A.M.B.R. (N.S.) 346, 70 F. 2d 243 (1934).

Section 30 of the Bankruptcy Act was repealed by Public Law 88-623, 78 Stat. 1001 (1964), which became effective on October 3, 1964. In view of the fact that the Act itself describes in great detail the procedures to be followed in bankruptcy cases under Section 30, it was necessary for Congress to act upon many bills which were concerned with no more than procedural changes. In order to relieve Congress of this burden, Public Law 88-623 gave to the Supreme Court of the United States the same general rule—making authority in bankruptcy that it already had in civil procedure, admiralty, criminal procedure prior to and including verdict, and review of decisions of the Tax Court. *Collier Bankruptcy Manual*, Matthew Bender & Co. 1965 at pages 395-395.1.

Although Public Law 88-623 repealed Section 30 of the Bankruptcy Act, it *specifically provided* that its repeal did not operate to invalidate or repeal prior orders prescribed under the authority of that section by the Supreme Court. In summary, the purpose of the General Orders in Bankruptcy, which remain in effect despite the 1964 amendment deleting Section 30, is

to aid in the execution of the Act as opposed to amending the Act.

With this background of the relationship of the Bankruptcy Act to the General Orders in Bankruptcy, the reasons which prompted Congress to add Subdivision (c) to Section 44 are more easily understood.

Prior to 1938, some District Courts [New York and elsewhere, although not the Ninth Circuit; see *In re Rury* (C.C.A. 9th (1924), 5 A.B.R. (N.S.) 295, 2 F. 2d 330)] had held that no attorney representing a creditor could also act as an attorney for the receiver or trustee. Analysis of H.R. 1289, 74th Cong. 2d Sess. (1936), at page 157.

The reason for this rule is stated by the court *In Matter of Carlisle Packing Co.* (D.C. Wash.), 12 F. Supp. 8 (1935), and is typical of one branch of judicial thought on this subject at that time. In *Carlisle*, the court held that a creditor's attorney was incompetent to act at the same time as counsel for the trustee. This determination was based upon former General Order 44 (as amended in 1933), and the relation of this General Order to General Order 21(6). General Order 44 stated that an attorney for the trustee could not at the same time represent any interest adverse "to any creditors." As there was the possibility under General Order 21(6) that the trustee would be required to re-examine a creditor's claim, the court felt that an adverse interest would exist in undertaking such dual representation, as an attorney could not represent a trustee who might have the obligation to re-examine the claim of a creditor who was represented by the trustee's attorney.

In summary, New York and several other courts felt that an attorney could not represent a general

creditor and also the receiver or trustee because the General Orders imposed certain duties on these court-appointed officers, the performance of which could give rise to a conflict of interest.

In 1938, Subdivision (c) was added to Section 44 of the Bankruptcy Act, with the stated purpose of abrogating the "New York" rule. The reason for this addition, notwithstanding the continued possibility that a conflict of interest might arise, was explained in the House Report which accompanied the enactment of this particular provision as follows:

"A rule exists in some district courts (New York and elsewhere) that no attorney for a creditor shall act as attorney for the receiver or trustee. Such rules are fundamentally unsound. There is no reason why an attorney for a general creditor cannot act as attorney for the receiver or trustee because the creditor can act as receiver or trustee (*In re Mayflower Hat Co.*, 23 A.B.R. (N.S.) 366, 65 F.2d 330) and if this can be done then his attorney should be allowed to represent him. A general creditor does not hold any adverse interest which would disqualify his attorney (*In re Rury* (C.C.A. 9th (1924), 5 A.B.R. (N.S.) 295, 2 F.2d 330).

"If creditors are to be allowed to select the trustee, then such trustee should be free to choose as his attorney, any attorney of the creditors. The only qualification in each case should be that the person selected is not connected with an adverse interest. The fact that the attorney selected is the attorney for a creditor of the estate does not necessarily mean that he is connected with an adverse interest. Creditors have an adverse interest only when they seek to have allotted to them more than a

pro rata share of the estate, or to retain some advantage over the other creditors which they secured prior to bankruptcy. . . .

“The disqualification should come as it now does against those creditors or their attorneys of any classification who represent one of the special classes of creditors, to wit, secured, preferred, or prior (which claim some priority in distribution), or who represent an adverse interest.” (Analysis of H.R. 1289, 74th Cong., 2nd Sess. (1936), at Pages 157-8.)

Following the addition of Subdivision (c) to Section 44, the phrase “any creditor” (the phrase relied upon by the court in *Carlisle*) was deleted from General Order 44.

In conclusion, Congress determined that despite the possibility that a conflict in representation might exist, as it does in any situation where dual representation is permitted, the possibility of such a conflict was more than outweighed by the economies which would result by permitting an attorney to represent a receiver or trustee and also one or more general creditors. In considering this policy determination, the court in *Cal-Neva Lodge, Inc.*, C.C.H. Reports, Para. 62,347 (1967), [Entire Case Attached as Appendix A], recently stated:

“The policy considerations which led Congress (11 U.S.C. 73(c)) to permit the attorney for a general creditor to represent a receiver or trustee (or debtor in possession) are not subject to review by this court. Like an entrapment which may be lawful or unlawful, this is a conflict of interest which is lawful rather than unlawful.” (*Id.* at pp. 5-6.)

- (2) **The Fact That One of the General Creditors Represented by Appellant Held a Personal Guarantee of Its Claim Executed by the Principal Shareholders of the Corporate Debtor, Does Not Disqualify Appellant From Representing the Receiver.**

Initially it should be pointed out that the fact that a creditor of a bankrupt also holds a guarantee from a third party, does not alter its status as an unsecured creditor under the Bankruptcy Act. As the court stated in *Doehler Die Casting Co. v. Holmes*, 52 N.Y.S. 2d 321 (1944), at pages 322-323:

“Only one other defense is worthy of mention. It is claimed that plaintiff, by filing a proof of unsecured debt in the bankruptcy proceedings, waived any claim he might have had against the defendant. However, *a guarantee of a debt of a bankrupt does not make the debt a secured one within the meaning of Section 1(28) of the Bankruptcy Act*, 11 U.S.C.A. §1(28). The security in such a case must be ‘upon the property of the bankruptcy.’” (Emphasis added.)

The last sentence of the above quotation raises a significant problem. Had the evidence shown that appellant actually knew at the time he prepared his affidavit, or even at the time that the order authorizing his employment was approved by the court, that the receiver had a cause of action to recover on behalf of the corporate debtor, assets which were in the possession of the guarantors, that fact would disqualify appellant from acting as attorney for both the receiver and such guaranteed creditor. The Findings of Fact made by the court do not, however, find that appellant

had such knowledge. Specifically, Finding of Fact 21 states as follows:

“That on or before June 6, 1963, the date of entry of the order authorizing his employment as attorney for the receiver, Grodberg actually knew, *or should have known*, that his representation of the receiver was then, or would be, *or at least might become*, in substantial conflict with his representation of Amstan.” (Emphasis added.)

This same kind of finding is made by the court in Finding of Fact 20, where the court states:

“That on May 31, at which time Grodberg prepared his affidavit and the application and order authorizing his employment as attorney for the receiver herein, there was, *in fact, an actual, if not yet known*, conflict of interest as between the receiver on one hand, and Amstan, on the other hand.” (Emphasis added.)

There is no finding of fact that appellant actually knew, either at the time the application, affidavit and order was prepared on May 31, 1963, or at the time the order authorizing his employment was entered on June 6, 1963, that the receiver might have some claim against the Manildis. In essence, the court finds that the mere existence of a guarantee of a general creditor's claim by the principal shareholders of the corporate debtor indicates the possibility of a conflict, since there is always the possibility that principals may have been diverting the assets of a corporate debtor, and the possibility of such a conflict disqualifies an attorney from undertaking dual representation.

However, it is clear that the possibility of a conflict of interest, as found by the court in *Carlisle*, does not, as the result of the addition of Subdivision (c) to Section 44 of the Bankruptcy Act in 1938, and the sub-

sequent amendment of General Order 44, prevent an attorney from undertaking such dual representation. As the result of this amendment, and the deletion of the term "any creditor" from General Order 44, the *possibility* that principals of a corporate debtor may have been diverting assets of the debtor to themselves, is, in itself, insufficient to prevent an attorney from undertaking such dual representation.

This conclusion is supported both by the analysis of Congressional intent set forth above, and by the most recent judicial interpretation of Section 44(c) contained *In the Matter of Cal-Neva Lodge, Inc.* In this case the United States had obtained a judgment for delinquent taxes against Sanford D. Adler (Adler), a creditor who had subordinated his claims against the debtor corporation of which he was the principal stockholder. Following the payment of all claims of creditors, a fund remained subject to the control of the court which was available for defraying the expenses of administration, with the balance of said fund to be paid to Adler. The claimants to the funds remaining were the attorneys for the estate and, derivatively, the United States by virtue of Adler's interest in the residue.

The court stated the question before it as follows:

"The only substantial question of law presented by the Petition for review is that Aaron Levinson, now deceased, one of the court-appointed attorneys for the debtor in possession, should be allowed no compensation for his services because of the failure of the initial petition for appointment of attorneys to disclose adverse interests, in violation of General Order 44. The petition of debtor corporation for the employment of counsel alleges, in part:

'That your petitioner proposes, upon the granting of this petition to [retain] LESLIE E. RIGGINS, of Reno, Nevada, the firm of QUITT-

NER AND STUTMAN, of Los Angeles, California, and AARON LEVINSON of Beverly Hills California, as counsel, who have agreed to accept such amount as may be fixed by this Court as compensation for any services rendered to your petitioner, which attorneys and firm of attorneys is now the attorney for the Debtor and whose interest is not adverse to that of the Debtor in possession or to the administration of this estate.'

"The objectors complain that Levinson was then the personal attorney of Sanford D. Adler, the principal stockholder and a large creditor of debtor corporation, and the personal attorney of several other creditors of debtor corporation whose claims aggregating in excess of \$650,000 were subsequently filed in the proceeding by Levinson.

"We conceive no adverse interest between a principal stockholder of a corporation and a corporate debtor in possession in a Chapter XI proceeding. With respect to corporate creditors, on the face of things their rights are adverse to the debtor in possession, and if it were not for a specific provision of the Bankruptcy Act, this Court would seriously consider disallowing Levinson's fee because the petition failed to disclose Levinson's connection with the creditors he represented. Proper practice requires such disclosure in any event under General Order 44. But Congress has seen fit expressly to declare that an attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor [11 U.S.C. 72(c)], and a debtor in possession is in substantially the same position as a trustee [11 U.S.C. 742]." (Id. at pages 4-5). (Emphasis added).

In summary, the possibility of a conflict of interest did not prevent Levinson from undertaking such dual representation because of a specific provision of the Bankruptcy Act, and the order allowing his fees was affirmed by the court.

- (3) **Neither In re Woodruff, 121 F. 2d 152 (1941), nor Woods v. City National Bank & Trust Co. of Chicago, 312 U.S. 262 (1940), Supports the Proposition That the "Mere Possibility" of a Conflict of Interest Prevents an Attorney From Representing Both the Receiver and a General Creditor.**

The Referee and the District Court take the position in Findings of Fact 20 and 21, and in Conclusions of Law 1 and 2, that the *possibility of a conflict of interest, i.e.*, the possibility that the Manildis (principals of the corporate debtor and guarantors of the claims of general creditors) were fraudulently diverting to themselves the assets of the corporate debtor, *per se*, prevents an attorney from representing the receiver and a general creditor with the Manildis' guarantee.

In support of this position the court relies on *In re Woodruff*, C.C.A. 9th (1941), 121 F. 2d 152, and *Woods v. City National Bank & Trust Co. of Chicago*, 312 U.S. 262 (1940), neither of which stand for the proposition for which they are asserted.

In *Woodruff* the receiver's attorneys, Turnbull & Meyberg, were appointed upon a verified petition of the receiver, which, though not signed by Turnbull and Meyberg, was prepared by them. At the time of such appointment and at all times pertinent to the action, Turnbull & Meyberg were also attorneys for a substantial general creditor whose claim was, at that time, disputed by the trustee, and this fact was known to them. In conjunction with the verified petition of the receiver for their employment, Turnbull & Meyberg filed affi-

davits with the court, each stating that he was "not employed by or connected with the bankrupt or any other person having any interest adverse to the receiver, trustee, or creditor." The fact that Turnbull & Meyberg were attorneys for a substantial general creditor whose claim was then in dispute was not disclosed.

The court found that the receiver's petition, and the affidavits filed in connection therewith, did not comply with the requirements of General Order 44. However, the majority of the court did not find that Turnbull & Meyberg had represented an interest adverse to the receiver in any matter upon which they were employed for such receiver, which is the finding required by General Order 44. Instead, the majority of the court determined that Turnbull & Meyberg were not entitled to compensation in that the application for their employment did not disclose the necessity for employing counsel, and an examination of the record indicated to the court that there was in fact no such necessity. As the court stated at page 155:

"The receiver's petition—written, filed and presented to the court by Turnbull & Meyberg—did not in terms state that it was necessary for the receiver to employ attorneys. It did, however, state that the receiver 'must have legal advice concerning his conduct.' This and other statements in the petition obviously were designed and intended to make it appear that it was necessary for the receiver to employ attorneys. The record discloses no such necessity."

Dissenting in part, Justice Healy stated:

"Where the trial court has authorized its receiver to employ counsel, I think an appellate court would rarely be justified in rejecting entirely the allow-

ance of compensation because of its belief, after the fact, that an attorney was not necessary. I do not believe that there is justification for that course here.”

In conclusion, *Woodruff* does not stand for the proposition that the possibility of a conflict of interest, or, in the words of the court, “an actual, if not yet known, conflict of interest” disqualifies an attorney from representing at the same time both a receiver and several general creditors, one of whom has its claim guaranteed by the principals of a corporate debtor. *Woodruff* does stand for the proposition that where there is no actual necessity for the receiver to employ counsel, an appellate court may make such determination and deny counsel any compensation which may have been allowed in error. To whatever extent the holding in *Woodruff* may be applicable to the case at bar, it should be pointed out that by holding that the reasonable value of the services performed by appellant was the sum of \$12,500.00 [Finding of Fact 19], the court also finds by implication that the receiver actually required the services of counsel.

In *Woods v. City National Bank*, the Supreme Court considered the question of whether attorneys who represented an indenture trustee and also bondholders, could be compensated from the estate. The property involved was an apartment hotel. A committee was formed to represent the first mortgage bonds in the reorganization. Counsel to the bondholders’ committee had also acted as general counsel for one of the two principal underwriters during the financing of the prop-

erty involved, and that underwriter's prospectus was under attack as containing certain misrepresentations.

The court pointed out that the bondholders' committee which counsel represented was "in substance a part of the indenture trustee's reorganization division." That committee was composed of five members, two of whom were officers or employees of one of the principal underwriters of the bonds, which underwriter was, in addition, heavily interested in the equity. Two members were officers of the indenture trustee. Two members were also members of bondholders' committees for neighboring apartment properties and dominated the committees representing the bonds of those other companies. There was more, but it is plain the evidence of the relationship between the trustee and the committee made up of members with sharply divided loyalties was ample to support the finding of fact of the District Court, which the Supreme Court expressly referred to, that counsel for the trustee and the committee represented conflicting interests.

In conclusion, it was an actual conflict of interest which resulted in the denial of compensation in *Woods*, not the possibility of one which might arise as the result of the dual representation undertaken.

In re Philadelphia & W. Ry. Co., 73 F. Supp., 169 (1947), the scope of the Supreme Court's decision in *Woods* was considered in detail as follows:

"The more difficult question is whether the fact that the firm represented both the indenture trustee and a group of bondholders makes it necessary to disallow the claim, and the answer depends entirely upon the scope of the decision of the Supreme Court in *Woods v. City National Bank*, 312 U.S. 262, 61 S. Ct. 493, 496, 85 L.Ed. 820.

The Commission argues that that decision lays down the rule that an attorney who represents an indenture trustee at the same time that he is representing bondholders may not under any circumstances be allowed compensation from the estate. I do not think that it goes so far as that.

"There are certain situations in which conflict of interest is always present, of necessity, arising from the nature of the interests themselves. Debtor and creditor, stockholder and bondholder or underwriter are illustrations of these. In such relationships actual conflict is conclusively presumed and the mere fact that counsel represents both sides is enough to forfeit his right to compensation.

"In other cases, while conflict may arise, there is no conclusive presumption that the interests are hostile and whether or not a lawyer represents more than one party must be denied compensation depends upon the existence, as a matter of fact, of a conflict in each particular case. *The mere possibility is not sufficient. As a matter of fact the possibility of conflict exists in almost every case of multiple representation.* Thus, where an attorney represents a large number of individual bondholders there is always a possibility that a minority will find that their interests lie in one direction and the majority in another. When this situation arises the attorney may not continue to represent all but until it does it has never been suggested that his representation of the group is improper. Plainly, representing an indenture trustee and a group of bondholders is in this latter class. An indenture trustee, of course, must act for what it conceives to be the benefit

of all the bondholders. There may be no division of opinion among them. So long as that is so, there is no actual conflict between its duties toward those whom it represents and its duties toward the bondholders as a whole. If diversity of aims arises between groups of bondholders, there is, of course, no question that the dual representation becomes improper." (*Id.* at p. 172.) (Emphasis added.)

In conclusion, neither *Woods* nor *Woodruff* stands for the proposition for which they are asserted. *Woods*, as interpreted by the court in *In re Philadelphia & W. Ry. Co.*, simply states that in certain situations a conflict of interest is always present, of necessity, because of the nature of the interests themselves. In the case at bar, the nature of the interests themselves do not automatically result in a conflict of interest unless the court presumes a fraud, *i.e.*, that the Manildis were diverting assets of the corporate debtor to themselves without the payment of adequate consideration. Without such a presumption, the nature of the interests themselves do not, by necessity, give rise to any conflict.

The purpose of the addition by Congress in 1938 of Subdivision (c) to Section 44 of the Bankruptcy Act was to eliminate as a bar to dual representation, "presumed frauds" and "possibilities of conflicts of interest." The holding in the case at bar by the referee and the District Court ignores this legislative determination, and attempts to reinstate by the use of the language "actual, if not yet known, conflicts of interest" that branch of judicial thought which was evidenced by the court's decision in *Carlisle*. Neither *Woodruff*, nor *Woods*, sanctions such a "rebirth", and Congress has expressly forbidden it.

II.

The Affidavit Filed by Appellant in Conjunction With the Application for His Employment as Counsel for the Receiver Contained All Facts Then Known to Appellant Which Might Reasonably Give Rise to a Conflict of Interest and Therefore Complied With the Requirements of General Order 44.

At the time appellant prepared his affidavit which was filed in conjunction with the application for his employment as attorney for the receiver, General Order 44, read in pertinent part, as follows:

“No attorney for a receiver, trustee, or debtor in possession, shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee, or debtor in possession, stating the name of the counsel whom he wishes to employ, the reason for his selection, the professional services he is to render, the necessity for employing counsel at all, and *to the best of petitioner's knowledge* all of the attorney's connection with the bankrupt or the debtor, the creditors or any other party in interest, and their respective attorneys . . .” (Emphasis added.)

While there was no specific requirement, at the time the receiver filed his application for the employment of appellant as his attorney, that appellant file an affidavit in conjunction with the receiver's application, the practice is apparently followed by most attorneys, even though the same is a holdover from prior rules existing in this area.

The application, order, and affidavit were prepared by appellant on May 31, 1963, and sent on said date to the receiver for his signature and filing with the

court. The affidavit which was prepared and signed by appellant recites, among other things, the following:

“ . . . ; that affiant represents certain unsecured creditors whose interests, *so far as known to affiant*, are identical to those of the receiver herein; that affiant does not represent any interest which is adverse to the receiver or to the creditors herein. . . .” [Finding of Fact 6.] (Emphasis added.)

The order of employment, which was approved by the court on June 6, 1963, recites that appellant was employed for the following reasons or purposes, among others:

“E. To examine witnesses under the provisions of Section 21-A (sic) of the Bankruptcy Act as the same may be found necessary or appropriate to ascertain facts and to determine if legal action should be taken to preserve assets of this estate including by way of specification and not by way of limitation the relationships between the above-entitled debtor and subsidiary or connected corporations with specific reference to business transactions between them.

“F. To advise and assist applicant in the collection of accounts receivable and all other money, funds and property due and owing to the debtor as the same may be found necessary.

“G. To prepare on behalf of applicant necessary legal applications, answers, orders, reports and other papers.

“H. To confer with the receiver rendering legal advice, and in general to render such other legal services as are usually rendered by attorneys for receivers in like proceedings.”

Subsequent to appellant's mailing to the receiver the Application for Employment of Counsel, Affidavit and Order, appellant received on June 4, 1963, a telephone call from the attorney in Chicago who had referred this matter to appellant. Said attorney advised appellant that one of the general creditors (Amstan), who was represented by appellant, held the personal guarantee of its claim by Mr. and perhaps Mrs. Manildi, who were principals of the corporate debtor, Haldeman Pipe & Supply Co. [Finding of Fact 8.] Said attorney requested that appellant file an action on said guarantee at the earliest possible moment, and attach certain real property owned by the Manildis in that he had been informed that other creditors of the corporate debtor also had guarantees, and were proceeding to levy and attach. [Finding of Fact 8.]

Following said telephone conversation, appellant notified the receiver, following a meeting at the Bank of America, that he had been informed that one of the creditors he represented held a personal guarantee executed by one or perhaps both of the Manildis. [Finding of Fact 11.]

Shortly thereafter, and on June 6, 1963, the receiver filed said Application, the Affidavit, and Order, and the same was approved by the court on the same date.

The question remains, whether under the circumstances set forth above, appellant was required by General Order 44 to set forth either in the application for his employment, or in his affidavit, the fact that one of the general creditors he represented held a personal guarantee of its claim executed by one or more of the principals of the debtor corporation. The language of General Order 44 relative to this question reads in pertinent part as follows:

“. . ., and to the best of petitioner's knowledge all of the attorney's connection with the bankrupt

or the debtor, the creditors or any other party in interest, and their respective attorneys . . .". (Emphasis added.)

The words italicized in the above quotation constitute an express limitation on the information which must be disclosed. Whether the petition actually be prepared by the receiver, or by the attorney acting as agent for the receiver, General Order 44 only requires that the attorney's connections with the bankrupt, debtor, creditors, or any other party in interest, be set forth to the best of either of their knowledge.

Similarly, because of the all-encompassing aspect of the disclosure requirement, it appears reasonable to assume that there is also an implied limitation on the information which must be disclosed. Simply stated, this limitation is to the effect that facts having no apparent relevancy to the matter in question are not required by General Order 44 to be set forth either in the application for employment of counsel or in, as in this case, an affidavit filed in conjunction with such application.

Admittedly, the question of what facts are "relevant" is one about which reasonable men can differ. This is especially true where the court has the ability to take advantage of "20-20 hindsight" in reaching its determination. However, it is clear from the evidence presented, that under the circumstances of this case, appellant could not, at the time he prepared the application for employment of counsel and his affidavit, be reasonably expected to anticipate that the receiver would assert a cause of action against the Manildis at some future date. After the appellant had prepared and sent these documents to the receiver for his execution of the application, appellant, *for the first time*, became aware that one of the creditors he represented

held a personal guarantee of its claim executed by the Manildis. It is submitted that appellant's knowledge of such guarantee should not have immediately suggested to him the necessity of amending his affidavit.

Appellant's initial contact with this case prior to June 4, 1963, came in a phone call on May 28, 1963, when he was first informed by the Chicago attorney that he would like appellant to represent certain of his clients. This telephone conversation was followed by one to counsel for the debtor, and a subsequent meeting with the referee to whom the matter had been assigned on May 31, 1963. The corporate debtor had been in existence for a considerable period of time and had substantial lines of credit with many major suppliers throughout the United States. An example of this fact is Amstan, which had an account receivable in excess of \$100,000.00.

On June 4, 1963, when appellant first became aware of the existence of the guarantee, he informed the receiver of that fact and there is no indication that the receiver felt any amendment to appellant's affidavit was necessary at that time. It is submitted that these facts should not have indicated to appellant the necessity of including the existence of the guarantee in either the application for his employment, or appellant's affidavit. Appellant did set forth the fact that he represented certain unsecured creditors whose interests, so far as known to appellant, were identical to those of the receiver.

Under the circumstances of this case, appellant included within his affidavit all facts then known to him which might reasonably give rise to a conflict in representation, and in doing so, complied with the requirement of General Order 44.

III.

Appellant's Representation of Amstan Did Not in Fact Conflict With His Representation of the Receiver, and Therefore the Court Does Not Have the Discretion Under General Order 44 to Deny Appellant the Reasonable Value of His Services.

- (1) **Itemlab, Inc., 257 F. Supp. 765 (1966), and Cal-Neva Lodge, Inc. Both Require That There Be an Actual Conflict of Interest, Not the Possibility of One, Before the Court Has the Discretion to Deny Fees Under General Order 44.**

In Parts I and II of Appellant's Argument it has been shown that the "mere possibility" of a conflict of interest which might arise when an attorney represents both the receiver and a general creditor with a guarantee of his claim by a third party, does not prevent an attorney from undertaking such dual representation. Furthermore, it is submitted that appellant's affidavit filed in conjunction with the application for an order authorizing appellant's employment as attorney for the receiver contained all facts which appellant could reasonably be required to disclose, and therefore complied with the applicable requirements of General Order 44.

The third sentence of General Order 44 sets forth the circumstances in which a court may deny compensation to an attorney who has represented a receiver, and reads as follows:

"If without disclosure any attorney acting for a receiver or trustee or debtor in possession *shall have represented* any interest adverse to the receiver, trustee, creditors or stockholders *in any matter upon which he is employed for such receiver, trustee, or debtor in possession*, the court

may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to take diligent inquiry into the connections of said attorney." (Emphasis added.)

In summary, General Order 44 requires that before the court acquires the discretion to deny appellant the reasonable value of his services, it must first find that:

- (a) Appellant did not make the disclosure required by General Order 44, and
- (b) Appellant represented an interest adverse to the receiver in a matter upon which he was employed for such receiver.

Appellant has stated in Part II of this Argument, the reasons why his affidavit complied with the disclosure requirements of General Order 44. It is submitted, therefore, that the requirement of Subparagraph (a) above has not been met.

With regard to Subparagraph (b), judicial interpretation of this provision uniformly requires the court to find, as a fact, that appellant represented an interest adverse to the receiver, *in a matter upon which he was employed for such receiver*.

For example, *In the Matter of Itemlab, Inc.*, 257 F. Supp. 765 (1966), a referee denied compensation to a law firm for services rendered by it as Special Counsel for the Trustee in Bankruptcy. It appears that on July 27, 1961, the debtor, *Itemlab, Inc.* (Itemlab) was adjudicated a bankrupt, and on August 25, 1961, the law firm of McLanahan, Merritt & Ingraham (McLanahan) filed a proof of claim in the amount of \$52,600.60 on behalf of Dutch-American Mercantile Corporation (Dutch). Dutch also asserted a lien against

the assets of the estate by virtue of a chattel mortgage given to Dutch's predecessor in interest, Blanmill Realty Corp. (Blanmill).

At a time when the Blanmill chattel mortgage appeared satisfied of record—but actually was not—the bankrupt had executed a second chattel mortgage in favor of Eighteenth Avenue Land Co. (18th Avenue).

Thereafter the Trustee in Bankruptcy petitioned the referee for appointment of McLanahan as special counsel to the trustee for the purpose of representing him in connection with all proceedings designed to set aside the 18th Avenue mortgage. A member of the McLanahan firm filed an affidavit which accompanied said petition, to the effect that said firm "did not represent any interest adverse to the trustee nor had any relationship with the bankrupt except that 'we represent Dutch-American Mercantile Corporation, who is a creditor of the * * * bankrupt'." (*Id.* at p. 765.) The affidavit made no mention of the fact that Dutch asserted a lien against the assets of the estate by virtue of the Blanmill chattel mortgage, and was therefore asserting a position as a secured creditor.

On October 20, 1961, the Referee appointed McLanahan as special counsel, and pursuant to this appointment his firm proceeded to attack the validity of the 18th Avenue mortgage. It was clear that if the 18th Avenue mortgage had been upheld, it would have consumed practically all of the assets of the bankrupt estate.

The 18th Avenue mortgage was successfully set aside, and McLanahan, representing Dutch, instituted a proceeding to direct the Trustee to pay to Dutch the sum of \$42,760.00, with interest, as a lien creditor. However, after several proceedings, Dutch's claim as a secured creditor was ultimately denied.

McLanahan, having completed the task of invalidating the 18th Avenue mortgage, applied on January 4, 1965, for compensation and reimbursement for representing the trustee. To this application the trustee responded by a motion for an order disallowing the compensation upon the ground that McLanahan had failed to disclose "an interest adverse to the trustee."

After hearing, the referee granted the trustee's motion. In reversing this determination, the court stated as follows:

"The result in this case depends to a great extent upon the interpretation and application of the present General Order 44 which is a question of law to which the 'clearly erroneous' standard does not apply. (Citing cases.) It also depends on determination of what constitutes an adverse interest and, if present, whether or not there was disclosure of such interest. General Order 44 relating to the appointment of attorneys for trustees sets forth conditions under which attorneys may be appointed and provides, among other things, that 'If without disclosure any attorney acting for a * * * trustee * * * shall have represented any interest adverse to the trustee * * * *in any matter upon which he is employed for such * * * trustee*, the court may deny the allowance of any fee to such attorney'." (Emphasis the court's.) (*Id.* at p. 766.)

In further defining the interpretive formula set forth somewhat generally hereinabove, the court stated that the primary question involved was as follows:

"The first and foremost question to be decided is whether McLanahan represented an interest adverse to the trustee *when it was employed by the trustee to set aside the 18th Avenue mortgage.*

An examination of the wording of General Order 44 discloses that it refers to an interest which is adverse in the matter upon which the attorney is employed by the trustee. * * * From the very nature of the proceeding, their interests were necessarily identical. If they were to be successful in recovering any of the assets for the estate, they were compelled to unite in the task of removing this barrier. It is difficult to understand how it can be said that the interests of these two parties were adverse in this particular proceeding which is the only proceeding where General Order 44 is applicable in this case . . . The fact that Dutch claimed a preferred lien and therefore an interest adverse to the trustee in the assets *after* the mortgage was removed did not make its interest adverse to the trustee *before* the mortgage was removed. Community of interest should not be confused with a conflict of interest. Thus it was unnecessary to decide whether McLanahan made sufficient disclosure with respect to Dutch's claim to a preferred status to the Blanmill route after the invalidation of the mortgage." (Emphasis the court's.) (*Id.* at pp. 766-767.)

This kind of factual approach is also found *In the Matter of Cal-Neva Lodge, Inc.*, where the court states at pages 4-5:

"Although the petition was deficient in failing to disclose 'all of the attorney's connections with the bankrupt or debtor, the creditors or other parties in interest' (General Order 44), a disallowance of fees should follow only 'if without disclosure any attorney acting for * * * the debtor in possession shall have represented any interest adverse to the creditors or stockholders in any matter upon which he is employed for such * * * debtor

in possession.' It is conceded by all that Levinson [one of the attorneys for the debtor in possession] did not in fact represent an interest adverse to the debtor in possession . . .

"If Mr. Levinson did represent Sanford D. Adler, he rendered a service to all other creditors of the debtor in possession by advising him to subordinate his claim to the claims of others. The record we have seen discloses no instance in which Levinson in fact acted adversely to the creditors of the corporation or to the debtor in possession."

In order to determine whether appellant represented an interest adverse to the receiver in any matter upon which he was employed for such receiver, it is necessary to examine the record to ascertain exactly what happened.

(2) Appellant Did Not Without Disclosure Represent an Interest Adverse to the Receiver in a Matter Upon Which He Was Employed for Such Receiver, in That When the Possibility of a Conflict Appeared, Special Counsel Was Appointed.

In the case at bar, shortly prior to July 26, 1963, appellant, acting as attorney for the receiver, prepared an application for the authority to employ an auditor. [Finding of Fact 12.] The reasons for the necessity of employing an auditor are contained in Paragraph 1 of said application, and in pertinent part, read as follows:

"That questions have arisen in the course of administration by the receiver in this proceeding respecting certain transactions between the above-named debtor, on the one hand, and one Santa Monica Plumbing & Supply Co., on the other hand. Additional questions have arisen respecting transactions between certain principals of the debt-

or, and by way of specification and not by way of limitation, the president thereof, Mr. Jack Manildi, Sr., and involving transfers of real property any other assets reputed to have been made from the debtor to said principals. That it is necessary for the protection of the assets of this estate and to enable the receiver to ascertain whether or not any valuable causes of action exist in favor of this estate as against said named parties and/or other third parties relative to said transactions, that an accounting be taken and that a review from an accounting standpoint be made of the books and records both of the debtor and said other parties." [Clk. Tr. pp. 16-17.]

The aforementioned application was prepared approximately one month and twenty days following the court's order approving appellant's employment as counsel for the receiver, and taking into account the complexities and magnitude of the debtor's business, does not appear to be an excessive amount of time between the commencement of appellant's employment and the preparation of said application.

Thereafter, on July 29, 1963, an order was entered authorizing the receiver to employ an accountant for the purposes described in said application. On August 19, 1963, in the course of a conference attended by the receiver, appellant, the accountant, and Hubert F. Laughran, attorney for the creditors' committee, said accountant orally reported that, in his opinion, it appeared likely that there were claims against Santa Monica Pipe & Supply Co. in favor of the receiver, and, although he had not completed his investigation at that point, his suspicions were aroused as to whether there also might be claims against the Manildis individually. [Finding of Fact 13.]

Immediately following the aforementioned meeting, appellant conferred with the receiver, and suggested that the receiver should employ other counsel to advise him with regard to claims which might develop against the Manildis.

On or about August 28, 1963, proposed special counsel prepared, and on August 30, 1963, the receiver filed, an application for authority to employ special counsel. In Paragraph III of said application the receiver sets forth the reasons for the necessity of employing special counsel which, in pertinent part, read as follows:

“Santa Monica Plumbing Supply Co. was carried on and operated at all times as a ‘division’ of the debtor. There were many inter company transactions. The debtor’s principal secured creditor is the Bank of America and the said Jack Manildi caused Santa Monica Plumbing Supply to guarantee the said account and likewise caused the debtor corporation to guarantee Santa Monica Plumbing Supply Company’s account with the Bank of America.

“That the debtor corporation purchased and acquired merchandise for resale and transferred the same to Santa Monica Plumbing Supply Company at cost. There were certain transactions of a much lesser amount by which Santa Monica Plumbing Supply Company sold to the debtor merchandise which it acquired at cost.

“Investigation is also being conducted with respect to the transactions between the debtor and Santa Monica Plumbing Supply Company with Jack Manildi.

“The investigations upon these matters have not been concluded and the creditors’ committee has

demanded there be a reservation in the plan of arrangement giving to the receiver upon behalf of the creditors, all rights of action which may be asserted as the result of said investigation." [Clk. Tr. at p. 53.]

In Paragraph IV of said application, the receiver summarizes the then state of the investigations as follows:

"The receiver alleges it will be in the best interests of the administration herein and the creditors that the receiver be authorized to employ the said firm of Craig, Weller & Laugharn as special counsel to pursue and conclude the said investigation, and, *should the facts so warrant* to institute in the name of the receiver as plaintiff appropriate proceedings to recover any assets or sums of money which the debtor and/or the receiver may be entitled to receive from Santa Monica Plumbing Supply Company and Jack and Vina Gale Manildi." [Clk. Tr. at pp. 53-54.] (Emphasis added.)

It is clear that at the time the receiver filed his application for the employment of special counsel on August 30, 1963, there still was substantial conjecture as to the nature of the claim, if any, which the receiver might have against Santa Monica Plumbing Supply Co. and/or the Manildis. On August 30, 1963, the court authorized the receiver to employ special counsel for the purposes contained in the aforementioned application. Appellant having withdrawn from advising the receiver with respect to these potential claims, took no further part in any of the matters upon which special counsel had been employed to "investigate further."

(3) **An Action Filed by Special Counsel Against the Manildis Was Settled With Court Approval Without Establishing That the Manildis Were Liable to the Receiver for Diverting Assets of the Corporate Debtor.**

On or about September 20, 1963, special counsel prepared for the signature of the receiver, an application for authority to file an action against Santa Monica Plumbing Supply Co., Jack Manildi and his wife, Vina Gale Manildi. Paragraphs II, III and IV of said application contain the reasons for the necessity of filing said action as determined by special counsel, and read in pertinent part as follows:

II.

“That the debtor has filed herein its Plan of Arrangement which provides in part the following:

‘The receiver and the creditors will waive any claim they have for and on behalf of the estate and themselves against Jack and Vina Gale Manildi and Santa Monica Plumbing Supply Company, unless at the time of the hearing re application for confirmation, such actions at law are already on file.’

III.

“The receiver respectfully alleges that he has various causes of action against Jack Manildi and Vina Gale Manildi, officers, directors and owners of the capital stock of the debtor and also against Santa Monica Plumbing Supply Company, a corporation, formerly owned by the debtor and now owned by the said Manildis.”

IV.

“Said causes of action pertain to the alleged indebtedness of said Jack Manildi, Vina Gale Manildi and Santa Monica Plumbing Supply Com-

pany to the debtor and further that the release and transfer by the debtor of the capital stock and ownership of Santa Monica Plumbing Supply Company was a fraudulent transfer and was a scheme, plan and design to deprive the debtor thereof. The receiver has various other causes of action against the three proposed defendants.” [Clk. Tr. at pp. 58-59.]

In essence, the application for authority to file the action against Santa Monica and the Manildis states that the “spin-off” of Santa Monica from the debtor was for inadequate consideration, and in effect that the assets of Santa Monica to some extent constitute the assets of the debtor. The application also mentions the fact that the receiver has other causes of action against the Manildis individually, but none are defined. Probably the most important aspect of the application is the fact, as recited in Paragraph II thereof, that under the Plan of Arrangement then on file, unless an action was on file at the time of the hearing *re* application for confirmation of the Plan of Arrangement, such actions would be waived. The hearing in regard to the confirmation of the Plan of Arrangement was set for September 23, 1963, just three days after the aforementioned application for authority to file an action against the Manildis and Santa Monica was filed. [Clk. Tr. at p. 68.] Special Counsel, not wishing to lose any cause of action he might have against the Manildis, requested by his September 20, 1963 application, authority to file suit against the Manildis and Santa Monica, and in fact, subsequent to receiving the court’s permission, filed said action on September 23, 1963, the very day scheduled for the hearing in regard to the confirmation of the Plan of Arrangement.

The hearing *re* confirmation was first continued to September 25, 1963, and subsequently to September

27, 1963, at which time the court entered its order confirming the plan. [Clk. Tr. at p. 68.] Said order reserved to the receiver all rights as against the Manildis and Santa Monica Plumbing & Supply Co. previously asserted in the action filed by special counsel on September 23, 1963, and further recognizes the existence of a trust established by those general creditors of the debtor whose claims were guaranteed by the Manildis. [Finding of Fact 17.] In summary, the court reserves to the receiver the causes of action against Santa Monica Plumbing & Supply Co., and the Manildis which were contained in the action filed by special counsel on September 23, 1963, and at the same time, approves the provisions of a trust the corpus of which contains real property standing in the name of the Manildis. The approval of the provisions of this trust automatically placed the corpus beyond the reach of the receiver.

On April 18, 1965, the receiver filed an application prepared by special counsel requesting permission to compromise the action filed against Santa Monica Plumbing Supply Co., and the Manildis on September 23, 1963. According to said application:

II.

“ . . .

“That under the agreements made herein for the collecting and impounding of funds resulting from the collection of accounts receivable of said Santa Monica Plumbing Supply Co., Inc., a trust account was opened in the Bank of America, 660 South Spring Street, Los Angeles, California, in the name of Hubert F. Laugharn and William J. Tiernan, into which the funds from the collections were to be deposited. There is a present balance of \$38,035.13 therein.”

III.

“The receiver has received an offer from Santa Monica Plumbing Supply Co., Inc., and Jack Manildi and Vina Gale Manildi to compromise the said pending litigation under which compromise the receiver is to receive the sum of \$32,000.00. This sum has been delivered to the receiver and he is holding the same in trust until the action of the referee upon his within application. The receiver has agreed to release the balance of the impounded funds, to wit, \$6,035.13 in said trust account and \$4,414.38 in the account of Santa Monica Plumbing Supply Co., Inc. in United California Bank, Santa Monica Branch, to Santa Monica Plumbing Supply Co., Inc., Jack Manildi and Vina Gale Manildi, and the savings account in the Union Bank in the amount of approximately \$20,900.00. The receiver has also agreed to release and assign to Jack Manildi and to Santa Monica Plumbing Supply Co., all accounts receivable of Santa Monica Plumbing Supply Co., heretofore collected or to be collected in the future. They to be accountable for said funds if the receiver’s application is not approved.” [Clk. Tr. at pp. 88-89.]

On or about April 18, 1965, the court approved the compromise of the aforementioned litigation for the amount set forth in the application, and in essence, permitted the receiver to settle all claims which it may have had against Santa Monica and the Manildis for the sum of \$32,000.00, which sum was paid from Santa Monica’s accounts receivable. As the application indicates, substantial sums were returned to both Santa Monica and the Manildis. The Manildis have not since been adjudicated bankrupt.

Whether the receiver ever actually had a collectible claim against the Manildis, individually, will never be

known. The litigation filed by special counsel for the receiver on September 23, 1963, named the Manildis as defendants. However, the settlement of that litigation did not involve the Manildis directly paying any of the sum received by the receiver. The important fact to note is, however, that immediately following the accountant's oral report on August 19, 1963, appellant withdrew from advising the receiver with respect to the possibility of establishing a claim against the Manildis. Special counsel was immediately appointed to pursue the investigation which had been started by the accountant, and continued to handle the litigation which was subsequently filed to its conclusion. Appellant in fact did not represent an interest adverse to the receiver on a matter upon which he was employed for such receiver in that when the possibility of a conflict appeared, he immediately withdrew.

(4) Appellant's Representation of the Receiver Until the Time Special Counsel Was Appointed in No Way Conflicted With the Receiver's Possible Rights to Recover Assets From the Manildis.

The referee and the District Court have made findings in the case at bar to the effect that appellant's representation of the receiver during the brief period from June 6, 1963, until the appointment of special counsel on August 30, 1963, in some way may have hindered the receiver in establishing his claim against the Manildis. Each of these findings of fact will be examined separately, and it will be seen that all of them stand for the position previously asserted by the referee and the District Court, that the theoretical possibility of a conflict, even though the same is not shown to exist in fact, is sufficient to deny reasonable compensation to appellant under General Order 44.

Finding of Fact 22 reads as follows:

“22. That Grodberg’s representation of Amstan, in connection with which he sought to recover from the Manildis, was in substantial conflict with the receiver’s possible rights to recover from the Manildis.”

Initially, the problem with this finding is that any time an attorney represents any person other than the receiver, there is the possibility that such representation may conflict with the receiver’s right to recover any sums which may be due from such person. However implicit in Finding of Fact 22 is the conclusion that the receiver did have some right to recover from the Manildis. By innuendo, the court assumes this fact, and then uses it to support the conclusion contained in this finding. As the foregoing analysis has indicated, the possibility of such a right was not substantiated until the accountant gave his oral report on August 19, 1963, and thereupon appellant withdrew and special counsel was appointed. Furthermore, it was never proved that the receiver did in fact have such a claim. The Referee and the District Court both used the word “possible” in defining the nature of the right which the receiver may have had to recover from the Manildis, and in determining whether it amounted to anything more than that, the receiver had the advise of special counsel.

Finding of Fact 23 reads as follows:

“That Amstan’s levy of attachment on real property standing in the name of the Manildis reduced, and militated against, the receiver’s ability to effect collection of any claim or cause of action he may have had against the Manildis.”

As no facts are presented in support of this conclusion, appellant is confronted with the problem of ar-

guing that Finding 23 is simply not true. In the middle of July, 1963, when the receiver suggested that an accountant be appointed to explore the relationships between the debtor, Santa Monica and the Manildis, appellant immediately prepared the application for the employment of such accountant, which was approved on July 29, 1963. When the accountant reported on August 19, 1963, that there might be claims against the Manildis, appellant withdrew from representing the receiver in this regard and special counsel was appointed.

If in fact Amstan's levy of attachment on the Manildis' real property did in fact "reduce and militate against" the receiver's ability to effect collection of the claim which he asserted against the Manildis, why did the court approve a plan of arrangement which put said real property beyond the reach of the receiver? Furthermore, how can the receiver and the district court find that the receiver's ability to collect the claim which he asserted against the Manildis was "reduced or militated against," when the final settlement of the litigation filed by special counsel resulted in returning funds over which the receiver had control to Santa Monica and the Manildis? It must be presumed that special counsel and the receiver did not return to Santa Monica and the Manildis any property to which the receiver had a valid claim, and, therefore, it is impossible to ascertain the facts upon which the referee and the District Court rely to support Finding of Fact 23.

Finding of Fact 24 reads as follows:

"That Grodberg's representation of Amstan rendered it improbable that he would advise the receiver that an involuntary petition in bankruptcy against the Manildis should be considered, and, if possible, filed, so as to avoid the various attach-

ments levied by the 'guarantee' creditors, including Amstan, on real property standing in the names of the Manildis."

Again, the referee and the District Court have assumed as the basis of this finding, that appellant, prior to the time he withdrew from representing the receiver with regard to possible claims against the Manildis, should have advised the receiver to consider an involuntary petition in bankruptcy against the Manildis.

Although the referee suggests that perhaps an involuntary petition in bankruptcy against the Manildis should have been considered, the record does not disclose any grounds upon which such a petition could be predicated, nor does the subsequent settlement of the litigation filed by special counsel for the receiver indicate that the same had any chance of success. In essence, the referee and the District Court have simply repeated Finding of Fact 20 which states that dual representation in the case at bar *per se* results in "an actual, if not yet known, conflict of interest." In Finding of Fact 24 the referee and the District Court simply speculate as to possible ways in which this conflict might manifest itself.

Finding of Fact 25 reads as follows:

"That Grodberg's representation of Amstan further rendered it improbable that he would have effectively advised the receiver in relation to any possible course of action which might conflict with or impede, the prior and secured position of Amstan in relation to the Manildi real property, or otherwise."

Again, the referee and the District Court have repeated their basic proposition that an attorney is prevented, *per se*, from representing a receiver and a gen-

eral creditor whose claim is guaranteed by the principals of the corporate debtor.

In reply to these findings, appellant simply states that the record discloses no instance where he actually represented an interest adverse to the receiver in a matter upon which he was employed for such receiver, and theoretical possibilities that he might have done so are insufficient to grant to the court the discretion to deny him under General Order 44, reasonable compensation for his services.

IV.

The Denial of Reasonable Compensation to Appellant for His Representation of the Receiver Constitutes an Abuse of Any Discretion the Court May Be Given by General Order 44.

- (1) Woodruff, 121 F. 2d 152 (1941), and Barry Yao Company, 172 F. Supp. 375 (1959), Do Not Support the Referee's and the District Court's Decision That in the Case at Bar, General Order 44 Requires the Denial of All Fees to Appellant.

General Order 44 provides that:

“

If without disclosure any attorney acting for a receiver . . . shall have represented any interest adverse to the receiver . . . in any matter upon which he is employed for such receiver . . . , *the court may deny the allowance of any fee to such attorney*, or the reimbursement of his expense, or both, and may also deny any allowance to the receiver . . . if it shall appear that he fails to take diligent inquiry into the connections of said attorney.” (Emphasis added.)

The court has held that appellant's failure to set forth in his affidavit the facts of his representation

of Amstan, and the guarantee of its claim by the Manildis, constitutes a substantial violation of and non-compliance with, the provisions of General Order 44, "which *requires* disallowance of any compensation to which he might otherwise be entitled as attorney for the receiver herein." [Conclusion of Law 5.] (Emphasis added.)

The referee in his memorandum *In re Application for Compensation* [Clk. Tr. pp. 139-157] cites in support of this determination, both *In re Woodruff*, 121 F. 2d 152 (1941), and *In re Barry Yao Company*, 172 F. Supp. 375 (1959). In Part I of this Argument, the court's decision in *Woodruff* was considered in detail, and, as will be remembered, the court denied fees to Turnbull & Meyberg by examining the record, and by determining as the result of such examination that no necessity in fact had existed for the employment of counsel. The court in *Woodruff* never found that Turnbull & Meyberg represented an interest adverse to the receiver in a matter upon which they were employed for such receiver.

In re Barry Yao Company, 172 F. Supp. 375 (1959), involved an application for attorneys' fees filed by attorneys who had been appointed special counsel for the receiver. The court stated the question before it as follows:

"So the specific problem presented is whether attorneys who misrepresent 'the value and extent of the services rendered' as counsel for a receiver, when petitioning for fees pursuant to Section 62, Sub. d of the Bankruptcy Act, are entitled to compensation for such services as they in fact rendered during their employment by the receiver; and if so, whether such misrepresentations affect the amount of the allowance to which the attorneys would otherwise be entitled." (*Id.* at p. 380.)

In answer to this question, the court determined that the attorneys requesting fees had failed to fully and accurately disclose in their petition the material fact as to the "value and extent" of their services as special counsel for the receiver, and by a review of the legislative history of Section 62 (Subdivision d) determined that the court was justified under such circumstances in denying all fees. Relying on an interpretation of the requirements of Subdivision d of Section 62, is of little assistance in the case at bar. The only question before the court is the interpretation and application of General Order 44, the alleged violation of which resulted in the denial of reasonable compensation to appellant.

The court, in exercising its discretion to deny all fees to appellant, undoubtedly is reflecting its basic view of the requirements of General Order 44. According to the referee:

"It would be my view that an attorney who represents one or more general creditors takes the risk of the penalties imposed by General Order 44 (11 U.S.C.A. following section 53) if, thereafter, adverse position should develop in respect to any of the claims represented by him. To permit exceptions, although equitable reasons might exist, is to place an unnecessary burden on the court." [Clk. Tr. at p. 152; Referee's Memorandum, p. 15, lines 4-10.]

If this court were to sustain the position taken in the foregoing quotation, it would immediately eliminate dual representation, and the benefits which Congress hoped would accrue therefrom. For example, it is always possible that sometime after dual representation is undertaken, the trustee may object to a claim filed by an unsecured creditor who is represented by the

same attorney who represents the trustee. It seems inconceivable that such an objection would disqualify an attorney from being compensated for services performed over a period of years in unrelated matters. But according to the referee, any attorney undertaking dual representation "takes the risk of the penalties" if thereafter adverse positions should develop in respect to any of the claims represented by him. It is submitted that General Order 44 does not require an attorney undertaking dual representation to play "Russian Roulette" with his fees, knowing that should anyone, including the trustee, object to the claim of an unsecured creditor he might represent, this fact would *ipso facto* give the court the discretion to deny to him all attorneys' fees which he had earned. (Such an interpretation is especially untenable when a claim of conflict is made in bad faith and subsequently never proved.)

(2) **Chicago & West Town's Railway v. Friedman**, 230 F. 2d 364 (1956), and **In re Philadelphia W. Ry. Co.**, 73 F. Supp. 169 (1947), **Are Controlling and Set Forth the General Rule That:**

- (i) **Once the Possibility of a Conflict of Interest Arises, an Attorney Should Withdraw as Appellant Did in the Case at Bar, and**
- (ii) **An Attorney Should Be Compensated for Beneficial Service Performed Which Are Unrelated to the Matter Giving Rise to the Possibility of a Conflict.**

It is submitted that the proper course of action once the possibility of a conflict becomes apparent, is for the attorney to withdraw as appellant did in the case at bar. Although appellant's research has failed to disclose any decision considering this question with respect to the requirements of General Order 44, both *Chicago & West Town's Railway v. Friedman* (C.A.

7 1956), 230 F. 2d 364, and *In re Philadelphia & W. Ry. Co.*, 73 F. Supp. 169 (1947), consider the questions of "timing a withdrawal" in the context of reorganization proceedings commenced under the Bankruptcy Act, and compensation for beneficial services rendered in matters unrelated to the conflict.

In *Chicago & West Town's Railway v. Friedman* the debtor was a public utility engaged in furnishing transportation in the Chicago area. It had outstanding first mortgage bonds totaling in excess of \$2 million, on which on July 1, 1947, there was a default in the matured principal and semi-annual interest.

In September, 1947, two bondholders' committees were permitted to intervene. One was known as the Leason Committee, and was represented by attorneys Raymond B. Morris and Harry A. Biossat. The second one was known as the Friss Committee, which was represented by attorneys William J. Friedman and Maurice Rosenfield, members of the firm of Friedman, Zoline & Rosenfield.

For a period of almost five years negotiations were undertaken to sell the company to the Chicago Transit Authority. When the aforementioned negotiations collapsed in the early part of 1953, Chicago Aurora & Elgin Railway Co. offered to purchase the company. The court eventually approved the plan to sell the company to Aurora & Elgin, and Maurice Rosenfield and William J. Friedman petitioned for fees regarding their employment as attorneys for the Friss bondholders' committee. Among the objections filed were that they were precluded from recovering compensation due to

the fact that they had represented an interest conflicting with that of the debtor. In finding such a conflict, the court stated as follows:

“Throughout the reorganization, petitioners’ (Friedman - Rosenfield) law firm was general counsel for Aurora-Elgin. The appearance for the (Friss) committee was filed by the firm Friedman, Zoline & Rosenfield. Petitioner’s partner, Zoline, was a director and also a secretary of that company (Aurora-Elgin).” (*Id.* at p. 368.)

And further at page 369:

“When the conflict of interest arose in May, 1963, petitioner could have followed the example of Bell, Boyd, Marshall & Lloyd and have withdrawn as counsel of the Friss committee. Not having done so they should be penalized any amount for fees that may be made.” (Emphasis added.)

Notwithstanding the apparent conflict in representation, and the failure to withdraw, the court went on to permit Friedman and Rosenfield to recover fees for the work they had done *prior* to the time the conflict arose.

In *Chicago & West Town’s Railway*, the facts recited by the court tend to indicate that the law firm of Friedman, Zoline & Rosenfield represented Aurora-Elgin, the ultimate purchaser, even before the last-mentioned organization offered to buy the assets of the debtor. As will be remembered, at this time Friedman and Rosenfield were also representing the Friss Committee. It would seem that in this situation there is at least a possibility of a conflict. Rosenfield and Friedman might have advised the bondholders’ com-

mittee not to consent to a plan whereby the assets of the debtor would be sold to the Chicago Transit Authority, thereby making such assets available to their client, Aurora-Elgin. Yet, since the court did not find any conflict in fact prior to the time when Aurora-Elgin made its offer to purchase the debtor's assets, the court awarded to Rosenfield and Friedman the reasonable value of their fees for representing the Friss Committee prior to the time the conflict arose.

Similar *In re Philadelphia & W. Ry. Co.*, the Court considered the question of whether the fact that the same firm of attorneys represented both the indenture trustee and a group of bondholders required it to disallow compensation. In concluding that the nature of the interests represented did not require the disallowance of compensation, the court stated as follows:

“Thus, where an attorney represents a large number of individual bondholders there is always a possibility that a minority will find that their interests lie in one direction and the majority in another. When this situation arises the attorney may not continue to represent all *but until it does it has never been suggested that his representation of the group is improper.*” (*Id.* at p. 172.) (Emphasis added.)

In the case at bar, the possibility that the receiver might have claims against the Manildis did not arise until the accountant made his oral report on August 19, 1963. Immediately thereafter appellant withdrew from advising the receiver with regard to the possibility of establishing such claims. In the receiver's application for the employment of special counsel which was

filed on August 30, 1963, the stated purpose was to investigate further the possibility of establishing such claims.

It is submitted that appellant withdrew from the situation giving rise to the possibility of a conflict as soon as the same became apparent. He thereafter continued to work for the receiver for a period in excess of two years on matters totally unrelated to any claims the receiver might have against the Manildis.

Following the filing of his application for attorney's fees on May 10, 1966, appellant for the first time was informed that the "possibility of a conflict" which appeared some two years before, from which appellant withdrew, with regard to which special counsel was appointed, and which in fact was never proved, required the court under General Order 44 to deny all fees to which he might otherwise be entitled.

In support of this position the referee and the District Court cite numerous possibilities of conflict, but none of them *in fact* existed. If permitted to stand, the court's decision in the case at bar would have the effect of greatly increasing the costs of administration. Each receiver and trustee would have his own permanent personal attorney, none of whom would be directly responsible to the creditors whose interests were actually being administered, and all of whom would share in the bankrupt estate prior to its distribution.

In 1938 when Congress added Subdivision (c) to Section 44 of the Bankruptcy Act, the stated purpose was to reduce the cost of administration by permitting dual representation. This addition and the economies

which it is designed to promote should not fall before the sophistry of “actual, if not yet known, conflicts of interest.”

Conclusion.

It is respectfully submitted that the judgment of the District Court be reversed, and that appellant be granted the reasonable value of his services as attorney for the receiver, as found by the referee.

Respectfully submitted,

BEARDSLEY, HUFSTEDLER &
KEMBLE,

By STEPHEN R. FARRAND,
Attorneys for Appellant,
Haskell H. Grodbreg.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STEPHEN R. FARRAND

APPENDIX A.

No. 923.

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEVADA.

In the Matter of

CAL-NEVA LODGE, INC., A NEVADA CORPORATION,
Debtor.

In Proceedings for an Arrangement, Chapter XI.

Order Affirming Fees Allowed by Referee.

This matter is before the Court on the petitions of the United States and of Sanford D. Adler to review the fees ordered paid to the attorneys for the debtor in possession.

The affairs of Cal-Neva Lodge, Inc. have been fully administered in a Chapter XI proceeding which resulted in the liquidation of the properties of the corporation under an approved plan of arrangement. Some eleven years have elapsed since the petition for an arrangement was filed.

A fund remains subject to the control of the Court which is available for the defraying of expenses of administration, the balance to be paid to Sanford D. Adler, a creditor, who subordinated his claims against the debtor corporation, of which he was the principal stockholder, to those of all other corporate creditors. The

approved claims of all other creditors have been paid in full.

The United States, derivatively, asserts the same right as does Adler. The United States has obtained a judgment for delinquent taxes against Adler and has levied upon Adler's claim against the debtor corporation. To the extent the Referee's allowance of attorney fees out of the estate might be reduced, the United States will benefit by pro tanto application of the sum disallowed to satisfaction of its claim against Adler.

Petitions for allowance of fees filed by the attorneys were duly noticed and objections thereto filed by the United States and Adler. Extensive hearings were held, briefs, proposed findings of fact and objections to the proposed findings were filed with the Referee, and the Referee ultimately entered extensive findings of fact and conclusions of law and allowed additional fees of \$125,000 to the attorneys for the debtor in possession.

The Court has read the petitions or proofs of claim submitted by the attorneys and the transcript and other evidence submitted. The findings of the Referee are supported by substantial evidence and are adopted and approved by the Court (General Order 47).

Of course, the allowance of compensation to bankruptcy officers and attorneys may always be open to re-examination until the estate is closed. *Goodman v. Street* (9 CCA 1933), 65 F. 2d 686; Collier on Bankruptcy, 14th Ed., Vol. 2, §39.18, p. 1484. The amount of just compensation for attorneys in any particular case is a matter of opinion and discretion. The general guidelines are that an estate should not, on the one hand, be unreasonably mulcted for the benefit of the at-

torneys, and that the attorneys, on the other hand, should not be awarded niggardly compensation for valuable services. The Referee's exercise of discretion in this area is subject to review. *Official Creditors Committee of Fox Markets, Inc. v. Ely* (9 CCA 1964), 337 F. 2d 461.

The Referee who allowed the fees supervised most of the proceedings. The allowances made are certainly not niggardly, but the facts as found by the Referee amply justify the allowance not only on a time basis but with reference to the results achieved and the benefits to the estate. "He was in a far better position than we to appraise how valuable * * * * (the) * * * * services were in reducing asserted claims; that is, to know whether the accomplishment was an easy or difficult one." *Miller v. Robinson, Trustee* (9 CCA, May 3, 1967), F. 2d

The only substantial question of law presented by the Petition for review is that Aaron Levinson, now deceased, one of the court-appointed attorneys for the debtor in possession, should be allowed no compensation for his services because of the failure of the initial petition for appointment of attorneys to disclose adverse interests, in violation of General Order 44. The petition of debtor corporation for the employment of counsel alleges, in part:

"That your petitioner proposes, upon the granting of this petition to [retain] LESLIE E. RIGGINS, of Reno, Nevada, the firm of QUITTNER AND STUTMAN, of Los Angeles, California, and AARON LEVINSON of Beverly Hills, California, as counsel, who have agreed to accept such amount as may be fixed by this Court

as compensation for any services rendered to your petitioner, which attorneys and firm of attorneys is now the attorney for the Debtor and whose interest is not adverse to that of the Debtor in possession or to the administration of this estate.”

The objectors complain that Levinson was then the personal attorney of Sanford D. Adler, the principal stockholder and a large creditor of debtor corporation, and the personal attorney of several other creditors of debtor corporation whose claims aggregating in excess of \$650,000 were subsequently filed in the proceeding by Levinson.

We conceive no adverse interest between a principal stockholder of a corporation and a corporation debtor in possession in a Chapter XI proceeding. With respect to corporate creditors, on the face of things their rights are adverse to the debtor in possession, and if it were not for a specific provision of the Bankruptcy Act, this Court would seriously consider disallowing Levinson's fee because the petition failed to disclose Levinson's connection with the creditors he represented. Proper practice requires such disclosure in any event under General Order 44. But Congress has seen fit expressly to declare that an attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor [11 U.S.C. 72(c)], and a debtor in possession is in substantially the same position as a trustee [11 U.S.C. 742]. In a bankruptcy context, the Referee's Finding No. XIII that “Levinson represented no interest adverse to the creditors or stockholders of Cal-Neva Lodge, Inc.” is correct. Although the petition was deficient in failing to disclose “all of the attorney's

connections with the bankrupt or debtor, the creditors or other parties in interest" (General Order 44), a disallowance of fees should follow only "if without disclosure any attorney acting for * * * a debtor in possession shall have represented any interest adverse to the creditors or stockholders in any matter upon which he is employed for such * * * debtor in possession." It is conceded by all that Levinson did not in fact represent an interest adverse to the debtor in possession. In the language of the brief of the United States, "The objector has no proof of bad conduct on the part of Mr. Levinson, but the law does not require such proof." In *In Re Barceloux* (9 CCA 1934), 74 F. 2d 289, the Court said:

"In the case at bar, no rule of court was violated. The participation of Freeman as an attorney was open, and the services rendered admittedly were valuable and a benefit to the estate, and this is no controversy as to division of fees between attorneys, and, in any action taken in rendering the services for which compensation was allowed, there was no conflict with the interest of the estate.

"In considering the principle here involved, this court in *In re Rury* (C.C.A. 9) 2 F. 2d 331, page 332, in a decision by Judge Rudkin, said: 'Petitioner also sought to disqualify the attorney who appeared before the state court for the trustee upon the ground that he had also acted as attorney for a creditor of the estate. The latter fact is denied, but the fact itself is not material; nor is it material to inquire whether the question is properly before us. There is no necessary conflict in interest between a creditor and a trustee in bankruptcy, and,

if the two see fit to join forces and employ the same attorney in an effort to recover assets, the adverse party or a stranger will not be heard to complain.'

"There was a similar holding in *In re Levinson*, *supra*."

In *In re Woodruff* (9 CCA 1941), 121 F. 2d 152, an allowance of attorney fees was denied because, among other things, the petition failed to disclose that the attorneys whom the trustee sought to retain represented a large creditor whose claim was disputed by the trustee. This is not the situation here.

If Mr. Levinson did represent Sanford D. Adler, he rendered a service to all other creditors of the debtor in possession by advising him to subordinate his claim to the claims of others. The record we have seen discloses no instance in which Levinson in fact acted adversely to the creditors of the corporation or to the debtor in possession.

The policy considerations which led Congress [11 U.S.C. 73(c)] to permit the attorney for a general creditor to represent a receiver or trustee (or debtor in possession) are not subject to review by this Court. Like an entrapment, which may be lawful or unlawful, this is a conflict of interest which is lawful rather than unlawful. Levinson did not act secretly; rather, for most of the claims he represented, his representation was disclosed on the claim. The failure of the petition for appointment of counsel to disclose his representation of creditors was not his doing, and if disclosure had been made, in all probability it would not have led the Court to reject the appointment requested by the debtor corporation.

In all the circumstances, Aaron Levinson and his personal representatives are not disqualified from receiving compensation for Levinson's services to the debtor in possession.

The Order Re Fees to the Attorneys for Debtor and Debtor in Possession filed by the Referee on May 10, 1966, is hereby affirmed.

Dated: June 16, 1967.

Bruce R. Thompson
United States District Judge

Filed June 16, 1967.

No. 22,537

IN THE

JUN 18 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HALDEMAN PIPE & SUPPLY COMPANY, a Corporation,
Debtor.

On Appeal From the United States District Court for the
Central District of California.

APPELLEE'S BRIEF.

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On Appeal From the United States District Court for the
Central District of California.

APPELLEE'S BRIEF.

I.

Applicable Statutory Provisions, and Preliminary Comment Thereon.

The central, "statutory" provision involved in the instant controversy is General Order No. 44 (11 U.S.C. following §53), promulgated by the Supreme Court, and particularly the third sentence thereof, which reads as follows:

"If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to take diligent inquiry into the connections of said attorney."

This admittedly punitive provision, in substance, codifies within the narrow context defined, the ancient, moral precept that no man can, or should, serve two masters, which is not only a firmly established tenet of our Judeo-Christian civilization, but is similarly a precept of every religious, moral or ethical system worthy of the name. Furthermore, the rule is erected not merely as a bulwark against the substance of evil, but also against the mere tendency thereto. (*Weil v. Neary*, 278 U.S. 160, 173, 49 S. Ct. 144, 73 L. Ed. 243, 250).

The rule likewise recognizes the inherent difficulty, if not the practical impossibility, of attempting to measure the extent or degree of damage resulting from any given conflict situation, after the fact, and the equally impossible burden which would be placed on the courts if they must attempt to measure the precise harm actually resulting therefrom in each case.

Many of the foregoing observations are clearly recognized in the following language of the Supreme Court in its leading decision entitled *Wood v. City Nat. Bank & Sav. of Chicago*, (1941) 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820, at pp. 268, 269:

“Furthermore, ‘reasonable compensation for services rendered’ necessarily implies loyal and disinterested service in the interests of those for whom the claimant purported to act. (Citations omitted). Where a claimant who represented members of the investing public was serving more than one master or was subject to conflicting interests, he should be denied compensation. *It is no answer to say that fraud or unfairness were not shown to have resulted.* (Cf. *Jackson v. Smith*, 254 U.S. 586, 589, 65 L. ed. 418, 424, 41 S. Ct. 200).

The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of bankruptcy rules, is apposite here; 'what is struck at in the refusal to enforce contracts of this kind *is not only actually evil results but their tendency to evil in other cases.*' (Citing, *Weil v. Neary*, supra, 278 U.S. 160).

"Furthermore, the incidence of a practical conflict of interests can seldom be measured with any degree of certainty. *The Bankruptcy Court need not speculate as to whether the result of the conflict was to delay action where speed was essential, to close the record of past transactions where publicity and investigation were needed, to compromise claims by inattention where vigilant assertion was necessary, or otherwise to dilute the undivided loyalty owed to those whom the claimant purported to represent. Where an actual conflict of interests exists, no more need be shown, in this type of case, to support a denial of compensation.*—A fiduciary who represents security holders in a reorganization matter may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well, or that his primary loyalty was not weakened by the pull of a secondary one. *Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that trodden by the crowd'.* (See Mr. Justice Cardozo in *In re Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 62 A.L.R. 1)" (Emphasis added).

Furthermore, since General Order 44 deals with a "bedrock" ethical or moral principle, it is not susceptible to the *ad hoc* "exceptions" which may be made, without undue danger, as to mere technical rules predicated on less fundamental considerations. Indeed, it is obvious that the very efficacy of the rule will be largely eroded if it be accorded anything but the "strictest" construction. (See, *e.g.*: *Weil v. Neary*, *supra*, 278 U.S. 160; *Matter of Woodruff*, (9th Cir., 1941) 121 F. 2d 152, cert. den. (1941) 314 U.S. 652, 62 S. Ct. 99, 86 L. Ed. 522; *Matter of Eureka Upholstering Co., Inc.*, (2nd Cir.) 48 F. 2d 95; *Albers v. Dickinson*, (8th Cir., 1942) 127 F. 2d 957; *Cf. Stratton v. New*, (2nd Cir.) 51 F. 2d 984, cert. den., 284 U.S. 682, 52 S. Ct. 199, 76 L. Ed. 576, holding that oral statements are not lawful substitutes for the prescribed affidavits).

Although there will later be considered, in depth, Appellant's unsupported assertion that the 1938 addition of subdivision (c) to §44 of the Bankruptcy Act (11 U.S.C. §72(c)), somehow "legalizes" a conflict of interest resulting from an attorney's dual representation of either a receiver or trustee and, at the same time, a general creditor, said subsection should be set forth verbatim, particularly since Appellant's purported quotation thereof, appearing at page 17 of his opening brief herein, conspicuously omits the key word "merely". Said subsection actually reads as follows:

"c. An attorney shall not be disqualified to act as attorney for the receiver or trustee *merely* by reason of his representation of a general creditor." (Emphasis added).

It is readily apparent that the deliberate inclusion of the word "merely" was to emphasize that Congress had

no intention, in adding the subsection, to abrogate, or alter in any respect whatever, the pre-existing provisions of General Order 44 proscribing conflicts of interest, and the inclusion of such word was clearly calculated to negate precisely the "construction" which Appellant so passionately urges herein. Appellant's significant omission of this key word in his purported quotation of §44(c), without the slightest indication thereof, even if unintentional, constitutes a tacit "Freudian admission" of the key significance of the word, and of the obvious intent of Congress to explicitly negate even the slightest implication that the subsection was meant to legitimize conflicts of interest under any circumstances.

II.

Appellant's Statement of the Case, the Facts, the Alleged Errors, and the "Questions Presented" Are Highly Distorted.

Before considering the numerous distortions of the facts and related matters, as contained in Appellant's opening brief, it is submitted that the Referee's findings of fact are correct and are uniformly supported by substantial evidence, in many cases by Appellant's own testimony. Since the Referee's Findings of Fact and Conclusions of Law encompass eleven (11) typewritten pages [Tr. of Rec., pp. 158-168, incl.] the same are set forth in "Appendix A", hereof. (Parenthetically, the reference to Appellant's client, American Radiator and Standard Sanitary Mfg. Company, as "Amstan", used in the Findings of Fact, will be employed also herein for the sake of brevity).

The following are significant excerpts from the Transcript of June 9, 1966:

1. Pages 3 and 4:

“Mr. Grodberg: Well, I believe that the original petition was filed on May 31, 1963, the petition for an arrangement. Now, at that particular time I represented a number of unsecured creditors. One of these unsecured creditors had a personal guarantee—

The Referee: Which one, so that we can be clear on that?

Mr. Grodberg: Oh, American Radiator and Standard Manufacturing Company.—

Mr. Grodberg: They had a personal guarantee which they had outstanding long since upon the basis of which, as I understand it, they had extended credit—

The Referee: A personal guarantee from?

Mr. Grodberg: Jack Manildi and Vina Gale Manildi, his wife.”

2. After testimony by Appellant appearing at pages 12 and 13 of the Transcript of June 9, 1966, relative to a meeting on August 19, 1963, between Appellant, Mr. Bumb, Mr. Laugharn and Mr. Kramer, the Receiver’s accountant, concerning the latter’s preliminary report indicating possible claims against Santa Monica Plumbing & Supply Company (hereinafter referred to as “Santa Monica”) and “suspicions” as to possible claims against Manildi, individually, Appellant testified, in part, as follows, at page 15 of said Transcript:

“Now, immediately after that meeting (of August 19, 1963) either in Mr. Bumb’s office or

in Mr. Laugharn's office, when the meeting had adjourned, I had a talk personally with Mr. Bumb *and it was at that time* that I put it to him and he agreed with me that I did not know if it was going to develop that there were any claims in favor of the Receiver against Manildi. *It appeared to me that the Receiver should have independent advice as to the nature and validity of those claims, or whatever they were, against Manildi, and that if it appeared that they were valid claims or that they were meritorious to warrant prosecution that he should have special counsel, both to advise him and to handle that prosecution,* and Mr. Bumb agreed with this, and therefore Mr. Bumb applied subsequently for the employment of Mr. Laugharn as the special counsel of the Receiver.

"Now, I voluntarily, Your Honor, stepped away from a situation where, as soon as it appeared to me there was a potential conflict or the possibility of a conflict between the Receiver and Manildi, you see, I immediately recommended to the Receiver and he followed that, with special counsel being appointed—" (Emphasis added).

The foregoing testimony, among other matters, is relevant in relation to Appellant's belated contention, raised for the first time on appeal, that no conflict, in fact, ever existed! (App. Op. Br. p. 37, *et seq.*) Such testimony is further relevant in respect to Appellant's assertion that there is no evidence that August 19, 1963, was the "first time" Appellant informed the Receiver

of the conflict (App. Br. p. 10.) While Appellant also states at page 10 that:

“ . . . Appellant testified that he had informed the Receiver of this suit and attachment on several occasions prior to the meeting on August 19, 1963 . . . ”

as with all his “factual” allegations, there is no reference to the transcript, and we have failed to find any such testimony. [See, also, Tr. of November 14, 1966, and December 2, 1966, p. 38.]

3. In further reference to the existence of a conflict of interest is the following testimony appearing at page 19 of the June 9, 1966, transcript:

“The Referee: Why did you think he (The Receiver) needed special counsel?

Mr. Grodberg: To decide whether or not the Receiver had any right in or to these five parcels (of real property owned by the Manildis, and on which Appellant had levied attachments, as had certain other ‘guarantee creditors’)

The Referee: Why couldn’t you do that?

Mr. Grodberg: Well, I could not do that because how could I advise Mr. Bumb as to this when I represented a creditor who’d be a beneficiary of a trust to which that parcel would be transferred or, pursuant to the new proposal, *I could not advise Mr. Bumb as to whether or not he had any right in and to that because I’d be on both sides of the picture, you see. That is why if was essential that he have the benefit of independent counsel, Mr. Laugharn.*” (Emphasis added.)

Notwithstanding the present denial of a conflict, it would appear from the foregoing that Appellant was well aware of it on June 9, 1966. [See, also, same Tr. p. 21, lines 19-21, incl.]

4. The following further testimony appears in the June 9, 1966, Transcript, page 28, line 14, to page 30, line 2:

The Referee: You are representing guarantee creditors and I don't expect you to tell me that the trust was no good or the levies were no good or the levies could not have been obviated by bankruptcy, for example.

Mr. Grodberg: Well, all I can say is, Your Honor, that as far as I know the levies could not have been obviated by the bankruptcy of Haldeman Pipe & Supply.

The Referee: If he were the alter ego?

Mr. Grodberg: Now we are getting into the question of alter ego.

The Referee: I don't say that he was, I am merely discussing the potential lawsuits in which an attorney for a trustee would normally give advice. It would be hard to get advice, I think, from one who is representing an attaching creditor who had a levy that he wanted to keep.

Mr. Grodberg: That is why I did not continue in that.

The Referee: All of which comes to the point that there was an adversity of interest. . . .

Mr. Grodberg: I honestly don't see it. Every time, are we to assume every time an attorney represents a corporation ipso facto there must be an alter ego possibility?

The Referee: No, but I venture this: every time you represent a trustee of a corporation you had better bear in mind the possibility of subsidiary suits against people such as stockholders, or directors or things of that sort.

Mr. Grodberg: Well, that is certainly, I mean, that is true. But I must say this, Your Honor, that this possibility does exist in every case, and if I may draw an analogy, there always exists in representation of any creditor that the facts may be found subsequently with respect to that particular creditor's claim.

The Referee: Do you know what happens then?

Mr. Grodberg: He cannot represent the trustee in that respect."

5. Also in the June 9, 1966, Transcript, the following appears at page 42, lines 14 to 23, inclusive:

"The Referee: Let me put it: Suppose there had been an affidavit presented to me the first time, whenever it was, when you were employed; that affidavit stated: 'I, Mr. Grodberg, wish to be employed as attorney for the trustee but I do represent a creditor who has a claim of some sort against a potential defendant in a suit filed by the trustee', do you think I would have authorized that employment?

Mr. Goldman, (Attorney for the Debtor): If that was all that there was to it, I don't think you would."

In the Transcript of November 14, 1966, and December 2, 1966, the following excerpts are significant:

1. At page 38, although Appellant told the Receiver that one of the creditors he represented held the guarantee of the Manildis, he could *not* remember when he told the Receiver of the attachment of the Manildi's real property. [See, also, p. 39, line 1, to p. 40, line 4.] Further, compare this testimony with the statement at page 10 of Appellant's Brief, that: "Appellant testified that he had informed the receiver of this suit and attachment on several occasions prior to the meeting on August 19, 1963". (As previously noted, without any transcript reference in support thereof).

2. At page 57, the following testimony of Appellant appears:

"Q. When did you first decide that someone other than yourself should represent Mr. Bumb in connection with any possible lawsuit against Mr. Manildi, personally, or Santa Monica? A. (By Mr. Grodberg) That was on or about August 19th.

Q. What prompted that, sir? A. We had a meeting at either Mr. Laugharn's office or Mr. Bumb's, I don't remember which, and at that time Mr. Kramer was present and —

The Referee: Just for the record, Mr. Laugharn represented the creditors committee?

The Witness: At that time he was the attorney representing the creditors committee?

The Referee: Yes.

The Witness: We had a meeting at that time and Mr. Kramer expressed the belief that there was cause for collecting money against Santa Monica Pipe & Supply in favor of Haldeman.

He also raised the question generally that he thought that possibly the matter should be gone into as to whether or not there was a cause of action against Manildi in favor of the debtor by reason of the fact that it appeared that at some time years before, as I recollect it, some of the parcels of real property which were in the debtor's name had at one time, some of them, belonged to Halde-
man.

Following that meeting, I discussed with Mr. Bumb the fact that I had represented, that I did represent a guaranteed creditor and on whose behalf I had been participating over a series of some weeks in general discussions and in discussions with creditors, with attorneys representing other guaranteed creditors, directed towards the possibility of making some kind of a settlement by way of establishing a trust, which ultimately was established, not in those terms as they were then being discussed, and I said in view of the fact this had occurred I thought probably, so that there would be no question about the fact whatever advice he obtained should be completely objective and independent, that he should hire Mr. Laugharn as special counsel.

This was after the meeting, Mr. Bumb and I personally discussed this, Mr. Laugharn was not present at this time.

The Referee: Why did you think he needed special counsel?

The Witness: Because I had been engaged in discussions previously about this real property and Mr. Kramer had indicated that he thought that

there was a possibility that he should look into the question of the true ownership of this property.

The Referee: Is that some of the property you had levied an attachment on?

The Witness: That is correct. When I learned that I said, 'Well, I think you should get independent counsel to advice you on this,' and that was done."

A. Appellant's "Statement of the Case".

1. Appellant states at page 2 of his Brief, that he was employed "as attorney for the Receiver by an Order made and entered on June 6, 1963" (p. 2); however, he neglects to state that he was so employed *generally*, and not merely as Special Counsel, or for some purely limited purpose only;

2. Also at page 2, Appellant states that he was denied any compensation for services rendered as attorney for the Receiver as a result of a "possibility" of a conflict of interest. As the Referee properly found [Find. 21], on May 31, 1963, at which time Appellant prepared the documents authorizing his employment, *there was, in fact, an actual conflict of interest as between the Receiver and Amstan*. Furthermore, on or before June 6, 1963, the date on which the Order authorizing his employment was entered, Appellant "knew, or should have known, that his representation of the Receiver then was, or would be, or, at least, might become, in substantial conflict with his representation of Amstan." [Find. 21.] See also Findings of Fact 22, 23, 24 and 25, and Conclusions of Law 1, 2, 3 and 4.

In short, there was, *in fact*, and *actual* conflict of interest existing even before his employment was au-

thorized on June 6, 1963, and on or before said date Appellant knew, or, certainly should have known, that there was, at least, a distinct possibility that a conflict existed, or would arise, as a result of his dual representation of both Amstan and the Receiver.

B. Appellant's "Statement of Facts".

Before pointing out some of the more glaring, factual distortions contained in Appellant's narration of the alleged facts, it should be noted that there are no transcript references whatever in Appellant's "Statement of Facts", and, further, that all too many of Appellant's "facts" are merely his interpretations thereof, rather than the facts as disclosed in the testimony or documentary evidence. That mere statements of Appellant's interpretations of the facts in lieu of the facts as disclosed by testimony or documentary evidence, with appropriate references to the transcript, is improper, is clear from the following excerpt from a talk given by the Honorable Raymond Peters, now Justice of the Supreme Court of California, in 1951, as set forth in the Los Angeles Daily Journal Report of April 30, 1968, in an article by Theodore A. Horn, of the Western Trial Lawyers' Conference, entitled "Post-Trial Remedies are a Varied Thing", page 11:

" 'It is important in your detailed statement of facts never to make any statement of a material fact in your brief without a transcript reference. Never misstate the record and be very careful to avoid overstating the record or stating your own conclusions or interpretations of the facts as a fact, just state the facts. Leave your interpretation for argument' ".

While Appellant states at pages 5 and 6 of his Opening Brief that after he received the phone call on June 4, 1963, from Collen (the Chicago attorney representing Amstan) requesting Appellant to immediately sue the Manildis, and attach their real property, he notified the Receiver that he represented a creditor holding a personal guaranty executed by Manildi, nevertheless, as found by the Referee, he significantly failed to advise the Receiver of the contemplated suit and attachment [See the Referee's Find. 11]. The following language from the Referee's Memorandum of May 5, 1967 [Tr. of Rec. p. 142] is pertinent:

"It is not clear whether at the time of the preparation of the application the applicant knew that the Amstan claim was guaranteed by the Manildis. In the transcript of June 9, 1966, page 4, line 13, Grodberg stated that 'when Mr. Bumb first spoke to me about representing him, which was at the very inception of these proceedings, I told him that I represented a creditor who had a personal guarantee (by the Manildis) . . . who were principals of the debtor—at least Mr. Manildi was, I don't recall whether an officer or not. They also were stockholders of the debtor . . . (p. 5, 1.22) And it was with that interpretation and understanding that the application for my employment was filed . . .'

"On the other hand, at the hearing held December 2, 1966 (p. 23, 1.25 to p. 24, 1.10) the applicant testified that the first knowledge he had of the guarantee was in the morning on June 4, 1963, by reason of a telephone conversation with Collen the attorney who represented the claims forwarded by

Manufacturers Clearing House, for whom the applicant appeared, including Amstan, a copy of which guarantee was forwarded to the applicant by letter dated June 5, 1963, and received June 7, or June 8, 1963 (the exact date not shown). (See Exhibits G 10 and G 10a. When Exhibit G 10 was introduced the second page was not available. Since that time by agreement of counsel the second page has been supplied and marked G 10.).

During the telephone conversation, Collen advised the applicant of the Manildi guarantee and stated he would send a copy to Grodberg, which he did by letter dated June 5, 1963 (Exhibit G 10). They also discussed the matter of filing an action against the Manildis and of attachment of property of the Manildis (Exhibit G 10).

The applicant could not recall when he told the receiver about any levy of attachment (12-2-66 tr., p. 38, 1.8, to p. 40, 1.4). On June 4 (after he talked to Collen) the applicant told the receiver about the guarantee, Leonard A. Goldman, attorney for the debtor being present (Goldman had been attorney for Manildi for about four to six weeks, beginning May 29 or May 31, 1963 (12-2-66 tr., p. 8, 1.17 to 23). At that time the applicant did not tell the receiver about the proposed attachment."

While Appellant notes at page 6 of his Brief that Haldeman and Santa Monica were "related corporations", he omits to state that both were wholly owned and controlled by the Manildis. [Find. 3.] Also, at page 6, Appellant states that rumors arose "subsequently and

during the course of the Receiver's administration" that "other claims against Santa Monica might exist in favor of Haldeman"; however, see, *infra*, the excerpts from the transcript of June 9, 1966, page 10, line 18, to page 11, line 2; the transcript of November 14, 1966, and December 2, 1966, page 45, line 14, to page 46, line 10, which strongly support the inference that such "rumors" were known to Appellant even *before* he drafted the Application for his employment.

At page 8 of his Brief, Appellant asserts that the Court's approval of the Plan of Arrangement "had the effect of relinquishing any rights the Receiver may have had in the real property constituting the corpus of the Leland Trust". However, in fact, there was a distinct possibility that some or even all of the real property would revert back to Manildi. See Appellant's own testimony, Transcript of December 2, 1966, pages 8 and 9, including the following portions thereof:

1. At page 8, lines 13 to 25, inclusive:

"A. That would depend. If Mr. Manildi had the option of paying seventy-five cents on the dollar of the 'Guaranteed Creditors' claims before a year was up, under the terms of the Trust—*then the real property would be returned to him—or, under the terms of the Trust, if some parcels could be sold within a year's period, by consent of all concerned, including the Receiver, if that were desired, then, if there was not enough from such sales to make up seventy-five cents on the dollar, it was anticipated that he would be given credit for the dividend to make up the additional amount. So that would depend on what facts evolved as to who would get the dividend.*" (Emphasis added.)

2. At page 9, line 13, to page 10, line 3, inclusive:

“A. I would suppose so—although—no—not really—because—you see, this was to the benefit of Mr. Manildi—these dividends; *in other words, he might not have to apply parts of the property to the Trust*—suppose he were to sell off two of them, one of the small ones—something like that—and raise enough to pay sixty per cent and then, as was anticipated, there would be within the year a dividend of fifteen per cent—we had projected a dividend of twenty-five per cent or more—then that fifteen per cent would be credited toward the seventy-five per cent, *and the property would be returned.*”

Q. Who would get the balance of the dividend on the claims? Would it go back to Mr. Manildi?

A. In effect it would because the creditors had settled for seventy-five cents on the dollar and he had been subrogated to whatever rights they had.”
(Emphasis added.)

Also relevant is the testimony of Hubert F. Laugharn, Special Counsel for the Receiver, appearing in the Transcript of June 9, 1966, page 35, line 16, to page 39, line 11, from which it is apparent that the critical time deadline with which said Special Counsel was faced when employed by the Receiver after the latter became aware of Appellant’s conflict of interest, rendered it virtually impossible to effectively determine, within the ten (10) days allotted [p. 37, lines 20-22, incl.] whether steps could be taken to avoid the attachment liens on the Manildis’ real property, as by the filing of Involuntary Petitions in Bankruptcy against them, and, at the same time, prepare and file the complex Complaint in

the Superior Court versus Santa Monica and the Manildis. [See, particularly, p. 38, lines 4-20, incl.; see, also, line 20, recognizing the possibility that a "residue" of the real property might revert back to the Manildis.]

Appellant's recitation of the facts: (1) that the Receiver's lawsuit against Santa Monica and the Manildis was eventually settled; and (2) that the \$32,000.00 paid to the Receiver by way of settlement, came solely from Santa Monica, are wholly irrelevant. Even where a claim, which gives rise to a conflict, is ultimately adjudicated to be wholly unmeritorious, such fact does not alter the fact that the conflict existed, nor does it preclude disallowance of the attorney's fee under General Order 44. (See, *e.g.*: *Woods v. City Nat. Bank & Sav. of Chicago*, *supra*, 312 U.S. 262; *In re Woodruff*, *supra*, 21 F. 2d 152.)

It also should be noted that conspicuously absent from Appellant's narration of the alleged facts, is any reference whatever to the facts set forth in the Referee's Finding of Fact 15, viz.: (1) that Appellant *never* directly advised the Referee that he was representing an adverse interest; and (2) that he *never* made, or even suggested, any modification of his affidavit, or the Receiver's Application.

Finally, it is again noted that Appellant cites no source for his statement (at p. 10 of his Brief) that he had "informed the receiver of this suit and attachment on several occasions prior to the meeting on August 19, 1963 . . .". and we are aware of no evidence thereof. To the contrary, see Appellant's testimony of June 9, 1966, *supra*, appearing at page 15 of the Transcript of said date.

C. Appellant's "Summary of Argument".

Appellant's said "Summary" assumes certain facts not in evidence, ignores other facts in evidence, begs certain issues and, generally, presents distortions of both fact and law. In the interests of brevity, only the more glaring examples will be catalogued as follows:

1. Appellant was disqualified from representing the Receiver not merely because he also represented a creditor whose claim was guaranteed by the debtor's principals, as Appellant infers at page 12, paragraph 1, but because there, in fact, existed a conflict of interest *ab initio*, which Appellant knew, or should have known, *prior* to entry of the Order authorizing his employment.

2. Appellant's assumption that the facts giving rise to the conflict of interest were "unknown" is not only unjustified, but it ignores credible evidence which strongly supports the inference drawn by the Referee, that prior to entry of the Order authorizing his employment, Appellant knew, or should have known, (1) that there were possible causes of action in favor of the Receiver against Santa Monica and the Manildis (the principals of both Santa Monica and the debtor); and (2) that his contemplated suit against the Manildis, and attachment of their real property, necessarily conflicted with his duty to the Receiver.

3. Clearly the facts set forth above should have alerted any attorney to the conflict of interest which actually existed, and, obviously, had they been set forth in either Appellant's Affidavit, or the Receiver's Application, it is extremely dubious that the Referee would have authorized Appellant's employment. Again, Appellant's assumption that the facts, pointing to conflict,

were “unknown”, ignores credible, if not compelling, evidence to the contrary.

4. Appellant’s paragraph 1, at page 13 of his Brief, while literally correct, borders upon absurdity since §44(c) obviously does not even purport to “disqualify” an attorney from representing fiduciaries appointed under the Bankruptcy Act, but merely removes the former *ipso facto* disqualification where the attorney also represented general creditors. We hasten to add that the mere removal of the previous automatic disqualification, was *not* intended to sanction or permit a conflict of interest arising from an attorney’s dual representation of a receiver or trustee and, at the same time, a general creditor, as Appellant appears to suggest.

5. Appellant’s paragraph 2, page 13 of his Brief, merely “begs the issue”, assumes that Appellant had no knowledge, or reason to know, of the conflict prior to his employment, and ignores credible evidence to the contrary. These observations apply equally to his paragraph 3.

6. Appellant’s paragraph 4 (p. 14) again ignores credible evidence that he knew, or should have known, before entry of the Order authorizing his employment, that a conflict existed, and blithely assumes the contrary. As previously noted, the facts that the Receiver’s lawsuit was ultimately settled, and that the funds paid thereunder were funds of Santa Monica is wholly immaterial as a matter of law.

7. While we propose to consider at a later point, Appellant’s new, and startling, assertion that he did not represent an adverse interest, it should be noted at this point that this new “argument” is contradicted at page

22 of his own Brief! Thus, at said page appears the following:

“Had the evidence shown that appellant actually knew at the time he prepared his affidavit, or even at the time that the order authorizing his employment was approved by the court, that the receiver had a cause of action to recover on behalf of the corporate debtor, assets which were in the possession of the guarantors, *that fact would disqualify appellant from acting as attorney for both the receiver and such guaranteed creditor.*” (Emphasis added.)

While we submit that credible evidence fully supports the Referee’s finding that Appellant knew, or should have known, the relevant facts respecting the probable conflict *before* he was employed by the Receiver, the conflict, in fact, existed regardless of knowledge, and Appellant’s apparent assumption that no conflict exists, unless and until it is known, is a gross *non sequitur*. That is, Appellant appears to suggest that a conflict of interest only exists where it is actually known by the parties. Obviously, the existence of a conflict and the knowledge thereof are separate and distinct, and an existing conflict is no less real merely because it may be unknown at a particular point in time. It is, at least, theoretically possible that a particular conflict might never be perceived; however, such abstract philosophizing is unnecessary here, since it is quite apparent from Appellant’s previously quoted testimony that, at least, as of June 9, 1966, he was aware of the conflict, regardless of when he acquired such awareness.

D. Appellant's "Questions Presented".

Appellant's "questions" are "loaded", distorted, assume facts not in evidence, ignore facts in evidence, and often "beg the issue."

1. The answer to question No. 1, page 15, obviously is not *per se*, but such an attorney should bear in mind the possibilities of causes of action in favor of the estate and against the principal; hence the facts respecting his representation of such "guaranteed creditor" should be set forth in the attorney's affidavit. Furthermore, the question framed, wholly ignores the existence of credible evidence which fully supports the Referee's finding that Appellant knew, or should have known, that a conflict existed *before* he was employed by the Receiver.

2. The answer to question No. 2, page 15, is an unequivocal "yes", and especially so where, contrary to Appellant's unfounded assumption, the attorney knows, or should know, the facts giving rise to the conflict even prior to his employment.

3. Appellant's multifaceted question No. 3 (a through f) is so replete with unfounded assumptions, so studiously ignores credible evidence contrary thereto, and so clearly begs the real issues, that it should be candidly labelled as "argument", rather than a reasonably fair and honest attempt to state the issue, or issues; this also disposes of question No. 4, which is wholly predicated upon the unfounded assumptions of question No. 3.

III.

The Finding With Respect to Appellant's Knowledge of the Probable Conflict of Interest, Is Supported by Substantial, if Not Compelling, Evidence.

The evidence clearly supports, if it does not virtually compel, the inference, clearly and properly drawn by the Referee, that prior to entry of the order authorizing his employment as attorney for the Receiver, which occurred on June 6, 1963, Appellant knew, or certainly should have known, particularly in view of his experience, that there was a real and probable conflict of interest resulting from his dual representation of Amstan and the Receiver, and stemming from (1) his duty to Amstan to acquire and preserve a lien in its favor on Manildi's real property, and (2) his duty to the Receiver to investigate and prosecute an apparent cause of action versus Manildi, based upon the latter's diversion of the debtor's assets to Santa Monica Pipe & Supply Co., and, concomitantly, to aggressively pursue any assets of Manildi as a source of satisfaction of any judgment that might be obtained against him. This evidence is as follows:

1. The Receiver's Application to Employ Appellant as Counsel [Tr. of Rec. pp. 10-12, incl.], which was prepared by Appellant, sets forth, *inter alia*, the following reasons or purposes for Appellant's employment:

"E. To examine witnesses under the provisions of Section 21-A (sic) of the Bankruptcy Act as the same may be found necessary and appropriate to ascertain facts *and to determine if legal action should be taken to preserve assets of this es-*

tate including by way of specification and not by way of limitation the relationships between the above-entitled debtor and subsidiary or connected corporations with specific reference to business transactions between them.” (Emphasis added.)

2. The full significance of the italicized language contained in the foregoing quotation, emerges more clearly in the light of certain testimony of Appellant, to be set forth hereinbelow, and also in conjunction with the further facts, set forth in paragraph 3 of the Referee’s Findings of Fact, pages 2, 3 [Tr. of Rec. p. 159]:

“3. That Jack Manildi was president, a director, and, with his wife, the sole stockholder of the debtor, and he was also president, a director, and with his wife, the sole stockholder of a second corporation, *Santa Monica Plumbing & Supply Company*. That there had been extensive business and credit transactions between the debtor and the last-named corporation prior to the filing of the debtor’s petition herein.”

As appears in the Transcript of June 9, 1966, page 10, line 18, to page 11, line 2, Appellant testified as follows:

“Now, it had been, I suppose you might say, generally scuttlebut-type of knowledge *that it was well known that Santa Monica had some kind of connection*—I won’t try to define the legality of their arrangement—*that Santa Monica and Haldeman were interrelated in some way*. As a result, I prepared an application for the appointment of the accountant, Mr. Kramer, to investigate on behalf of Mr. Bumb the relationship between San-

ta Monica Pipe and Haldeman *because the rumors had it that Santa Monica was being used, to use plain language, to milk Haldeman.*" (Emphasis added.)

Further, in the combined Transcript of November 14, 1966, and December 2, 1966, Appellant further testified as follows on December 2, 1966, page 45, line 14, to page 46, line 10:

"Mr. Potts: I believe I can clarify that again.

Q. Isn't it true, Mr. Grodberg, you first learned of the Manildi situation on June 4th when you had a telephone conversation with Mr. Collen who then advised you of the guarantee? A. No, that is not so. On the day that I filed in order to prepare the application for appointment of attorney, the day Mr. Goldman and I came down here [i.e., May 31, 1963. See same transcript, same page, lines 6 to 8, inclusive], then we discussed, as we discussed in chambers with Your Honor, a general picture of the case, that was it. I asked Mr. Goldman to relate to me, to summarize to me what proposals, if any, had been made, so I would get an over-all picture of what the situation was. *Undoubtedly he mentioned to me that there was a person named Jack Manildi who was a principal [of the] debtor, I am sure that must have occurred* although I don't remember any specific discussion about it. *But I was made aware Haldeman was a substantial corporation, that Manildi was its president, that he had a son in there who was apparently active, that there were a number of other persons also active in the corporation. He gave me some ideas which*

I incorporated, as a matter of fact, in the application for appointment as the attorney for the Receiver.” (Emphasis added.)

(See subdivision E. of the Application to Employ Appellant as attorney for the Receiver, *supra*).

In the aforesaid, combined Transcript of November 14, 1966, and December 2, 1966, Appellant further testified as follows, page 46, line 13, to page 48, line 11, inclusive:

“The Referee: When did you learn there were other corporations with which Haldeman had had past dealings?

The Witness: Mr. Goldman.

The Referee: And what was said in that respect?

The Witness: Well, he said there was an account receivable in favor of Haldeman against Santa Monica Pipe, and, as I understood it, there was a proposal to settle that for \$50,000 for which the Receiver collected \$32,000. I don't know the details of that, but that was my understanding of it.

The Referee: This was back when?

The Witness: May of 1963. I may be way off on that, but that shows the extent of my actual knowledge of the details of it.

The Referee: All right, you may proceed.

Mr. Potts: Thank you, Your Honor.

Q. Now, Mr. Grodberg, do you have a copy of the application for your employment in your file?

A. I have it in another file.

The Referee: We will take a recess now for ten minutes, the reporter and I are getting tired.”

[Whereupon, a recess was taken after which, all parties being present as heretofore noted, the proceedings were further resumed as follows]:

“Q. [By Mr. Potts] Do you have it, Mr. Grodberg? A. I do.

Q. I would like to direct your attention to Paragraph E., I wish you would read that over and then I would like to ask you about it, if I may. A. Yes.

Q. Now what do you mean when you are referring to ‘and not by way of limitations the relationships between the above-entitled debtor and subsidiary or connected corporations’, and so on, what had you reference to? A. I had reference to the fact it was my understanding, from my conversation with Mr. Collen, that there was an account receivable in favor of Haldeman Pipe & Supply Company and against Santa Monica Plumbing Supply Company, which was a related corporation as I understood it.

Q. Why did you use the plural ‘or connected corporations’, if it was only Santa Monica that you had in mind? Was that an oversight or a typographical error? A. It had no special significance.

Q. *You recall last time, on June 9th, you testified there was, to use your term, scuttlebut knowledge to the effect there was an interrelationship between Santa Monica and Haldeman. Am I correct, Mr. Grodberg?* A. Yes.

Q. *And that, again, was the information which you had derived from Mr. Goldman?* A. Yes.”
(Emphasis added.)

Clearly, all of the foregoing testimony justifies, if it does not, in fact, virtually compel, the inference, which the Referee obviously, and properly, drew, viz.: that *before* even drafting for the Receiver's signature, the application for Appellant's employment, Appellant *must have known* that there was a distinct possibility, if not probability, that Manildi, as the controlling principal of both corporations, had diverted assets from the debtor to Santa Monica Plumbing & Supply Company, and, as a necessary corollary, that a cause, or causes, of action existed in favor of the Receiver against Manildi. Since Appellant was requested by Collen on June 4, 1963, to sue on Manildi's guaranty, and attach the latter's real property, the likelihood and dimensions of the conflict of interest should have been apparent to any attorney of even modest experience, and certainly to one with Appellant's previous bankruptcy practice and experience.

That the Referee did, in fact, find from Appellant's own, foregoing testimony that the contemplated 21(a) examinations, as referred to in subdivision "E" of the Receiver's Application for Appellant's employment, *supra*, which Appellant himself prepared, included an examination of Manildi, is clear from the following language contained in the Referee's Memorandum of May 5, 1967, page 12 [Tr. of Rec. p. 150, lines 18-25, incl.] :

"Grodberg contends that item (E) relating to examination of witnesses under Section 21a was intended to apply to a \$50,000 account receivable assertedly owing by Santa Monica Plumbing. *It must be held that the contemplated examinations would include an examination of Manildi as the*

representative of the debtor and that such examinations properly conducted would inevitably lead to the causes of action in Case No. 825741 (by the Receiver versus Manildi, et al)”. (Emphasis added.)

In short, the Referee drew the obvious inference that at the time Appellant drafted the Receiver’s Application for Appellant’s employment, on May 31, 1963, Appellant contemplated, *inter alia*, examining Manildi relative to possible diversions of the debtors’s assets to Santa Monica Plumbing and Supply Company, and hence Appellant must have then known that there existed, at least, the possibility of a particularly acute conflict of interest arising from his representation of Amstan, and his impending representation of the Receiver.

Since Appellant received instructions in the course of his telephone conversation with Collen (the Chicago attorney for Amstan) on June 4, 1963, to immediately sue and attach the Manildi’s real property, it appears inescapable that he then *must have known* that there existed a very real and acute conflict of interest arising from his dual representation of Amstan, and his impending representation of the Receiver. This was two (2) days *prior* to entry of the Order authorizing his employment as attorney for the Receiver. Certainly the evidence more than supports the inference drawn by the Referee.

It is, of course, elementary, that the Referee’s findings of fact *must* be accepted on both review and appeal, unless they are “clearly erroneous”. (Rule 52(a), Fed. Rules of Civ. Procedure; Bankruptcy General Order 47; *Earhart v. Callan*, (9th Cir., 1955) 221 F. 2d

160, cert. den., 350 U.S. 829, 76 S. Ct. 59, 100 L. Ed. 740; *Gold v. Gerson*, (9th Cir., 1955) 225 F. 2d 859; *Lines v. Falstaff Brewing Co.*, (9th Cir., 1956) 233 F. 2d 927, cert. den., 352 U.S. 893, 77 S. Ct. 129, 1 L. Ed. 2d 88; *Hudson v. Wylie*, (9th Cir., 1957) 242 F. 2d 435, cert. den., 355 U.S. 828, 78 S. Ct. 39, 2 L. Ed. 2d 1; *Hoppe v. Rittenhouse*, (9th Cir., 1960) 279 F. 2d 3; *Jue v. Bass*, (9th Cir., 1962) 299 F. 2d 374; *Englebrecht v. Bowen*, (9th Cir., 1962) 300 F. 2d 891).

It further appears settled now that the "clearly erroneous" test applies even to factual inferences drawn from so-called "undisputed facts" (*United States v. Gypsum Co.*, (1948) 333 U.S. 364, 68 S. Ct. 525, 541, 92 L. Ed. 746; *C.I.R. v. Duberstein*, (1960) 363 U.S. 278, 291, 80 S. Ct. 1190, 1200, 4 L. Ed. 2d 1218.) While there were decisions in the Ninth Circuit, and certain other circuits as well, appearing to reflect a contrary view, the Ninth Circuit, at least, has now clearly accepted the foregoing rule enunciated by the Supreme Court, as a result of its decision in *Lundgren v. Freeman*, (9th Cir., 1962) 307 F. 2d 104, noted (1963), in 41 Tex. L. Rev. 935. In the 1967 Pocket Part to Barron and Holtzoff, Federal Practice and Procedure, Vol. 2B, the following appears in §1132, at pages 160, 161 thereof:

"§ 1132.—Inferences.

In a major opinion, the Ninth Circuit, recognizing the differences of view in its earlier decisions, has accepted the understanding of Rule 52 here urged. The case is *Lundgren v. Freeman* (cited in footnote No. 17.13, P. 161), in which Judge Duniway spoke for the court. Attributing to the late Judge Jerome N. Frank the view that the

appellate court is free to find the facts for itself where the evidence was written, and to Judge Charles E. Clark the view that the 'clearly erroneous' test applies regardless of the nature of the evidence, the court said: 'It seems to us that the Clark view is favored by history. Rule 52(a) incorporates the type of review that previously was had in equity cases . . . Nothing in the history of review of equity cases or of law cases tried without a jury suggests that the appellate court ever decides issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. Rule 52(a) explicitly clearly applies where the trial court has not had an opportunity to judge the credibility of witnesses.' This forthright and scholarly opinion, if heeded elsewhere, should end any doubt as to the scope of review of findings of fact."

It follows, *a fortiori* that the Referee's factual inferences drawn from *disputed facts* must be accepted unless "clearly erroneous". Here, the evidence is so clear, and the inference so compelling, that only the most naive and unsophisticated trier of fact could have failed to perceive, and draw, the obvious and compelling inference which forms the basis of the Referee's Finding of Fact 21 herein, viz.:

"That on or before June 6, 1963, the date of entry of the Order authorizing his employment as

attorney for the receiver, Grodberg actually knew, or should have known, that his representation of the receiver then was, or would be, or, at least, might become, in substantial conflict with his representation of Amstan." [Tr. of Rec. p. 187.]

It is submitted that the Referee's alternative finding that Appellant "should have known" of the probable conflict of interest, is less the result of any real doubt as to Appellant's knowledge thereof, than it is a manifestation of an understandable reluctance to state categorically, and with unseemly omniscience, the extent or state of another's "knowledge" as of a particular point in time, irrespective of the persuasive evidence thereof. It is further submitted that: (1) it was within the Referee's province, as trier of fact, to arrive at this finding, and (2) that the evidence supporting the same is sufficiently substantial, if not compelling, that it cannot be viewed as erroneous in any respect, much less "clearly erroneous."

IV.

The Principles of Law Governing the Instant Appeal Are Contained Solely in General Order 44; Furthermore, Section 44(c) of the Bankruptcy Act Was Not Intended to, and Does Not, Affect in Any Manner, the Provisions of Said General Order.

We have heretofore set forth verbatim the third sentence of General Order 44, which is the operative provision governing conflicts of interest. Said General Order was promulgated by the United States Supreme Court on April 13, 1925, under and pursuant to the authority set forth in former §30 of the Bankruptcy Act (11 U.S.C. §53), which said section was repealed on

October 3, 1964, in connection with which, the rule making power was transferred to 28 U.S.C. §2075, subject, however, to the proviso that such repeal did *not* operate to invalidate or repeal prior rules, forms, or orders prescribed by the Supreme Court under the authority of §30. The final sentence of the new §2075 (28 U.S.C.) reads as follows:

“All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”

General Order 44 was amended in 1933, 1936, and finally in 1939, *after* the enactment of the Chandler Act of 1938. The third sentence, which governs the instant controversy, was added in 1933, and has been continued with minor changes, not material to this controversy, ever since.

Contrary to Appellant's view that the General Orders are merely ancillary, procedural rules to be given but little weight, even some of the decisions cited by Appellant clearly recognize the substantive importance of the General Orders. Thus, in *Matter of Hodges*, (D.C., Conn., 1933) 4 F. Supp. 804, affirmed, *sub nom.*, *United Wall Papers Factory Inc. v. Hodges*, (2nd Cir., 1934) 70 F. 2d 243, cited at p. 18 of Appellant's brief, the Court expressly stated the following at p. 806:

“It has, of course, long been established that general orders of the Supreme Court under authority of the Bankruptcy Act *are to be regarded as the statutes*, *In re Brecher*, 4 F. 2d 1001, 1002,” (Emphasis Added).

(See, also, *Matter of L. M. Axle Co.*, (6th Cir., 1925) 8 F. 2d 581, at p. 582).

Appellant's novel contention, for which absolutely no authority is cited, that the 1938 amendment adding subdivision (c) to §44 of the Bankruptcy Act (11 U.S.C., §72(c)), somehow modifies the third sentence of General Order 44, has the support of neither reason for authority, and would certainly come as a surprise to the Supreme Court which revised General Order 44 in 1939, *after* the 1938 addition of subdivision (c) to §44, for the purpose, as stated in the prefatory note to the General Orders in bankruptcy, as follows:

"To conform to the many revisions of the act effected by the Chandler Act of 1938."

It would violate all established canons of statutory construction, not to mention the most elementary principles of logic, to construe §44(c) as a *sub silentio* repeal of, or amendment to, *any* portion of General Order 44. It should be noted that the decision by the Court of Appeals for the Ninth Circuit in the *Woodruff* case, *supra*, 121 F. 2d 152, was handed down *after* the 1938 addition of subdivision (c) to §44, and said decision quite obviously construes General Order 44 as strictly as any of the pre-1938 decisions.

The purpose, and the *sole* purpose, of the addition of subdivision (c) to §44 of the Bankruptcy Act was to remove the pre-existing fiat under which an attorney for a creditor was absolutely precluded from representing either a Receiver or Trustee in bankruptcy. That Congress intended nothing more is clearly evident from its use of the word "merely", which Appellant so conveniently omitted from its purported quotation of §44(c), at p. 17 of his brief. As previously stated, Congress expressly utilized the word "merely" to emphasize that an attorney representing a general creditor

was not to be disqualified from representing, a Receiver or Trustee in bankruptcy, *merely* by reason of his representation of such general creditor, and to further emphasize that the statute is not to be construed as accomplishing more than the mere removal of the previous automatic disqualification.

Since the addition of subdivision (c) to §44 of the Bankruptcy Act was not remotely intended by Congress to legitimize a conflict of interest, contrary to the clear provisions of General Order 44, the substantive result of the addition of said subsection (c) is simply this: although an attorney for a general creditor is now free to act as attorney for either a Receiver or Trustee in bankruptcy, the old *ipso facto* qualification having been removed, nevertheless, if he elects to do so, such attorney *assumes the inherent risk of possible disallowance of his fee, should it develop that a conflict of interest, in fact, existed, irrespective of whether the same was known or unknown, at the time of his employment.*

Of course, such "inherent risk" is all the greater, where, as here, the creditor whom the Receiver or Trustee's attorney also represents has a guarantee by a principal of a corporate bankrupt or debtor, since there is *always* the definite possibility that the Receiver or Trustee may have a cause of action against the principal for a bankruptcy preference, director's preference, fraudulent transfer, diversion of assets, etc., and the more "experienced" the attorney, the greater should be his awareness of this fact.

The foregoing merely underscores the importance in any such "high risk situation" of making a thorough and meticulous disclosure to the Court of all possible

conflicts of interest, and, specifically, all material facts bearing upon the attorney's relationship to, and representation of, a general creditor, or creditors. It is where, as here, the attorney fails to make the requisite disclosure that he is, to quote from Appellant's brief, playing "Russian Roulette" with respect to his fees, and the simple and obvious way to obviate the risks incident to such "Slavic speculation", is simply to disclose to the Court all of the attorney's relevant connections with the general creditor or creditors involved.

Incidentally, Appellant's interpretation of *In re Rury*, (9th Cir., 1924) 2 F. 2d 330 (p. 19 of Appellant's brief) as being contrary to the pre-1938 rule precluding attorneys for general creditors from representing bankruptcy Receivers or Trustees, is, at least, questionable. All that the Court there held was that "there is no *necessary* conflict of interest between a creditor and a Trustee in bankruptcy and, if the two see fit to join forces and employ the same attorney in an effort to recover assets, *the adverse party or a stranger will not be heard to complain.*" (Emphasis Added). See, also, 2 Collier on Bankruptcy, (14th Ed.) ¶14.22, p. 1680. See, also, p. 1681, Footnote 5, setting forth, *inter alia*, the following:

"But an attorney for a creditor whose claim is under attack should not be chosen as attorney for the Trustee whose duty it is to make the attack. See *Pepper v. Litton*, (1939) 308 U.S. 295, 41 Am. B.R. (N.S.) 279, 40 S. Ct. See, also, *Matter of Woodruff*, (C.A. 9th, 1941) 46 Am. Br. (N.S.) 567, 121 F. 2d. 152, cert. den., (1941) 314 U.S. 652, 62 S. Ct. 99, 86 L. Ed. 522, where it was held that attorneys for a creditor whose claim

was disputed by the Trustee should not be appointed attorneys for what was in effect an ancillary Receiver."

In his zeal to "construe" the 1938 addition of subdivision (c) to §44 so as to support his position, Appellant appears to intimate that Congress thereby intended to "legalize" a conflict of interest arising from an attorney's representation of both a general creditor, as well as a bankruptcy Receiver or Trustee. Not only is there nothing in either §44(c) or in its legislative history to remotely suggest any such drastic intention, but Congress' advised inclusion of the word "merely" expressly negates any such drastic intent. Furthermore, it is a well established rule of statutory construction "that nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself." (50 Am. Jur. Statutes, §229, p. 214; *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 70 L. Ed. 1059, 46 S. Ct. 619; *Howard v. Illinois Cent. Ry. Co.*, 207 U.S. 463, 52 L. Ed. 297, 28 S. Ct. 141). The following, additional rule of statutory construction, set forth in 50 Am. Jur. Statutes, §229, p. 281, is clearly applicable:

"It has even been presumed that the legislature intended that the statute should be construed in the light of settled and uniform policy of the law relating to the subject matter, and that there is no intention to depart from any established policy of the law. Accordingly, a purpose to effect a radical departure from a firmly established policy will not be implied but must be expressed in clear and unequivocal language, and such policy is not to be regarded as abandoned further than the terms

of the statute and objects of the legislature unmistakably require. Citing: inter alia, *Murdock v. Memphis*, 20 Wall, (U.S.) 590, 22 L. Ed. 429.” (Emphasis added).

See, in accord, 45 Cal. Jur. 2d Statutes, §100, p. 614.

Applying the foregoing rule to the instant case, it is submitted: (1) that it is the strong, settled, and uniform policy of the law to prohibit conflicts of interest; (2) that any legislative enactment, departing from such fundamental policy, could not be characterized other than as a “radical departure from a firmly established policy”. Not only is there nothing in §44(c) in the nature of “clear and unequivocal language”, indicating an intention to depart from the long settled and uniform policy of proscribing conflicts of interest, but, as previously noted, the inclusion of the word “merely” explicitly negates any intention of so doing. In fact, it is all but inconceivable that Congress would “inferentially” strike down the settled rule, based upon a centuries-old moral doctrine, which prohibits conflicts of interest. It is further submitted that the foregoing observations are wholly consonant with the further rule of statutory construction, viz: “The courts may not, by implication, read into a statute that which is not intended to be there, or make an implication which the language of the statute does not warrant”. (50 Am. Jur. Statutes, §242, p. 238; *United States v. Merriam*, 263 U.S. 179, 44 S. Ct. 69, 68 L. Ed. 240, 29 A.L.R. 1547).

While the decision in the *Matter of Cal-Neva Lodge, Inc.*, (D.C., Nev.), set forth in “Appendix A” of Appellant’s brief, is readily distinguishable from the facts

of the instant case, nevertheless the unfortunate dictum employed therein, as quoted at page 21 of Appellant's brief, conflicts with all rules of statutory construction, not to mention, common sense, if by said language the Honorable District Court is "construing" §44(c) as "legalizing" a conflict of interest. Furthermore, these rules of statutory construction, all of which are, of course, based upon logic, clearly apply, *a fortiori*, as to General Order 44, dealing as it does with fundamental principles of morals and ethics, as distinguished from mere technical rules of law. Only the clearest and most unequivocal language, precluding any other logical interpretation, could reasonably lead to the conclusion that §44(c) was intended to modify General Order 44, and authorize a conflict of interest, as an "exception" to said General Rule, and the ethical concept on which it is predicated. Again, no such "clear and unequivocal language" remotely evincing such intent, is to be found in §44(c).

V.

The Woodruff Case Is Controlling, and the Facts of the Instant Case Are Manifestly Stronger in Support of Disallowance Than the Facts of Woodruff.

Unfortunately, Appellant's "analysis" of the *Woodruff* case is equally as distorted as his recitation of the facts of the instant case.

The facts of the *Woodruff* case, insofar as they relate to General Order No. 44, may be briefly summarized as follows: On July 5, 1939, Woodruff filed a Voluntary Petition in Bankruptcy in the District Court for the Eastern District of Oklahoma, and was, on the

same day, adjudicated a bankrupt. On July 13, 1939, one M. E. Heiser filed an Involuntary Petition against Woodruff in the District Court of the United States for the Southern District of California, and, on the same day, the California court appointed one E. A. Lynch as Receiver. Thereafter, on July 20, 1939, at the first meeting of Woodruff's creditors, the Oklahoma court appointed the appellant, one P. M. Jackson, as Trustee in Bankruptcy, and, thereafter, on July 27, 1939, the California court, upon the verified petition of the Receiver, authorized the employment of Leonard J. Meyberg and Rupert B. Turnbull, as attorneys for the Receiver. Subsequently, on October 16, 1939, an Order was entered to the effect that the California case be transferred to the Oklahoma court for the greatest convenience to the parties in interest. The Oklahoma Trustee objected to the fee allowances of both the Receiver and his attorneys. With respect to the attorneys, the Oklahoma Trustee asserted that their fees should be disallowed under General Order No. 44, for non-disclosure of a conflict of interest.

After quoting General Order No. 44 verbatim, the majority opinion in *Woodward* held as follows:

"In this case, the receiver's attorneys (Turnbull and Meyberg) were appointed upon a verified petition of the receiver which, though not signed by Turnbull and Meyberg, was prepared by them. At that time and at all times here pertinent, Turnbull and Meyberg were attorneys for Heiser, the petitioning creditor, whose claim against the estate, amounting to \$278,631.71, was disputed by appellant as trustee. Thus, at the time of procuring their appointment as attorneys for the receiver,

Turnbull and Meyberg represented an interest adverse to the trustee and the estate in the matter upon which they were to be engaged. This fact was well known to the receiver, but was not disclosed in his petition.

“Attached to and filed with the receiver’s petition were the affidavits of Turnbull and Meyberg, each stating that he was ‘not employed by or connected with the bankrupt or any other person having an interest adverse to the receiver, trustee or creditor.’ The fact that Turnbull and Meyberg were attorneys for Heiser was not disclosed.

“The court below found that the receiver disclosed to the court that Turnbull and Meyberg were attorneys for Heiser, but the finding does not state when or how the disclosure was made. The evidence does not show that it was made at all. (Setting forth in Footnote No. 4, the following: ‘It should here be noted that the judge who made the finding was not the judge who made the order authorizing the employment of Turnbull and Meyberg as attorneys for the receiver. The order was made by Judge James, the finding by Judge Cosgrave.’) It certainly was not made at the time or in the manner required by General Order 44.

“The receiver’s petition—written, filed and presented to the court by Turnbull and Meyberg—did not in terms state that it was necessary for the receiver to employ attorneys. It did, however, state that the receiver ‘must have legal advice concerning his conduct’. This and other statements in the petition obviously were designed and intended to make it appear that it was necessary for the

receiver to employ attorneys. The record discloses no such necessity.

"We conclude that the appointment of Turnbull and Meyberg as attorneys for the receiver was procured in violation of General Order 44, and that they are, therefore, not entitled to compensation. Assuming, without deciding that, in some circumstances, a bankruptcy court may, in the exercise of its discretion, allow compensation to attorneys whose appointment was procured in violation of General Order 44, we hold that, in the circumstances here shown, to allow such compensation was an abuse of discretion." (Emphasis added).

The dissenting opinion in *Woodruff* graphically points out how and wherein the facts of the instant case far more strongly call for disallowance than the facts involved in *Woodruff*, e.g.: (1) in *Woodruff* the attorneys were merely attorneys for what was, in substance, a mere ancillary receiver, who, as the dissenting Judge noted, was appointed "merely to conserve assets", and who had no duty to pass on the validity of claims; (2) in *Woodruff*, although the attorneys' representation of the creditor, Heiser, was not technically "disclosed" in their affidavits, nevertheless, it was abundantly apparent from various recorded documents, as noted by the dissenting Judge, as follows:

"The record is replete with evidence of the disclosure. It was on the petition of Heiser that the involuntary adjudication was made by the trial court, and the attorneys Meyberg and Turnbull signed the petition as attorneys for Heiser. Likewise it was this creditor who petitioned for the ap-

pointment of the receiver, and *his petition is signed by these attorneys as counsel for Heiser*. The order of the court appointing the receiver recites that it was made *'upon motion of Rupert B. Turnbull, attorney for said petitioner'*. Indeed, from first to last the record discloses on its face that *these attorneys were counsel for Heiser, and the court could not but have been aware of that fact.*" (Emphasis Added).

It is submitted that the following observations of the dissenting Judge render it clear that he would have supported disallowance on the facts of the instant case:

"The spirit of the rule should be strictly enforced, but there is no justification for a purely mechanical application of it. Here, although the disclosure was not made in the precise manner required by the rule, there was an actual and complete disclosure of the facts. Ordinarily, it would be only in the petition itself that opportunity would be given to make the disclosure, but here the situation was different."

Manifestly, there was nothing in the record at the time of Appellant's employment to even remotely reflect his representation of "Amstan", nor to reflect the highly significant facts, known to Appellant prior to his employment, viz: (1) that "Amstan" held the personal guarantee of the principal of the Debtor; and (2) that there were "rumors" to the effect that the principal, Manildi, had caused assets of the Debtor to be diverted to Santa Monica, another corporation of which he was the dominating principal.

The majority opinion in the *Woodruff* case, insofar as it holds that “oral disclosure” is insufficient, is fully in accord with *In re H. L. Stratton, Inc.*, (2nd Cir., 1931) 51 F. 2d 984, which case, if anything, resulted in an even “harsher” decision. Thus, in the *Stratton* case the attorneys were surcharged for their entire fee of \$15,000.00, over four (4) years after payment of same, based upon non-disclosure of a conflict of interest in their affidavit, notwithstanding that they had made an oral disclosure to the Judge, and, further, despite the fact that the Receiver’s contention that a set-off was unlawful was ultimately held to be unmeritorious. With respect to the “harshness” of the decision, the court had the following to say:

“However unfortunate the result may be to them (the attorneys), General Order No. 44 precludes appointment of counsel except upon order of the court founded on such an affidavit as is prescribed. It is not enough that they believed that the set-off was lawful and that an investigation finally bore out the correctness of their conclusion —.

“Although everything indicates that the attorneys rendered valuable services to the estate of the bankrupt, we are constrained to hold that they are barred from receiving compensation as attorneys for the Receiver because of failure to comply with General Orders Nos. 42 and 44, and Local Rules Nos. 4 and 11, and that they must restore to the Trustee the \$15,000.00, which they have been paid. *This is a drastic order, but the rules were made to be followed and require the results we have reached.*” (Emphasis Added).

In the *Woodruff* case, as well as in *Stratton*, the Trustee's objection to the claim of the creditor represented by the Receiver's attorneys was ultimately held to be unmeritorious. Hence, as previously noted, the fact that the Receiver's lawsuit in the instant case was ultimately settled by the Receiver's acceptance of funds from Santa Monica, as distinguished from the Manildis, is wholly irrelevant as a matter of law.

In *Earl Scheib, Inc. v. Superior Court*, (1967) 61 Cal. Rptr. 386, holding that the duty of an attorney to refrain from representing conflicting interests, continues *even after the termination of his employment by a former client*, the court stated the following at page 389:

"An attorney has a constant and perpetual rendezvous with ethics. He stands as a trustee for his client's interests, a most sacred and confidential relationship. It is elementary that a conflict of interest between a trustee and his beneficiary is never permissible. As a trustee cannot maintain an attitude adverse to his beneficiary, so an attorney may not represent claims inconsistent with those of his clients, or conflicting claims of two clients. He cannot serve two masters."

This very case is an example of the reasons why the rules of ethics must be strictly enforced. Thus, as found by the Referee, Appellant must have known that a potential conflict very definitely existed, *ab initio*. However, he saw fit to take the "calculated risk", undoubtedly with the thought that when the conflict became so obviously apparent that it could not be ignored,

Appellant could then simply recommend that the Receiver employ "other counsel", and thereby gracefully bow out without any adverse consequences to himself. Clearly, the Supreme Court promulgated General Order No. 44 for the precise purpose of discouraging attorneys from taking precisely such "calculated risks" with all the potential evils attendant thereto.

Additionally, as pointed out by the Supreme Court in the *Woods* case, *supra*, it is almost impossible to determine the degree of damage resulting from a conflict of interest after the fact, and courts should not be required to assume such an onerous and inherently difficult burden.

VI.

Appellant's Dual Representation of "Amstan" and the Receiver, Clearly Involved a Conflict of Interest.

Appellant's belated contention that no conflict, in fact, existed need not overly detain us. Although Appellant's own testimony, and excerpts from his brief, previously quoted, clearly recognize that a conflict existed; nevertheless, we need not rely on Appellant's own "admissions". As noted in *In Re Westmoreland*, (D.C. Ga. 1967) 270 F. Supp. 408, at p. 411, the gist of a conflict within the meaning of Canon Six of the Canons of Professional Ethics of the American Bar Association, is as follows:

"Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Applying the foregoing, simple test to the instant facts, Appellant's duty to "Amstan" was to acquire and preserve a prior attachment lien on real property of the Manildis, whereas Appellant's duty to the Receiver was to attempt to recover *any* property of the Manildis and, particularly, the self-same real property which, at one time, stood in the name of the Debtor, and which Manildi had caused to be transferred unto himself. A clearer case of conflict of interest is difficult to conceive.

Finally, with respect to Appellant's argument that Special Counsel was appointed *after* the fact of the conflict of interest was brought to the Receiver's attention, with the asserted result that Appellant did not represent the Receiver in connection with the matter involving the conflict, such simplistic and self-serving argument ignores the fact that Appellant was employed *from the beginning as General Counsel* for the Receiver, and that the conflict of interest existed in acute form *at least* from the date of his employment on June 6, 1963, to a date subsequent to August 19, 1963, when Special Counsel was employed. Furthermore, as noted by the Supreme Court in the *Woods* case, *supra*, it would be virtually impossible to speculate after the fact, as to what might have been accomplished by Appellant had he devoted his efforts loyally and vigorously on behalf of the Receiver, particularly in light of his unique information to the effect that Manildi had caused assets of the Debtor to be diverted to himself, and to Santa Monica.

VII.

**The Decisions Relied Upon by Appellant Are
All Factually Distinguishable.**

Before proceeding to briefly analyze the factual distinctions between the facts of the instant case and certain of the decisions relied upon by Appellant, it should be conceded, in the interests of intellectual honesty, that at least one, or possibly two, of the decisions, while definitely distinguishable, are very possible contrary in philosophy to the provisions of General Order 44, the Supreme Court's decision in the *Woods* case, *supra*, and this Court's decision in the *Woodruff* case, *supra*. In so stating we have in mind, particularly, a case not cited by Appellant but which we feel compelled to bring to the Court's attention, namely, *Fine v. Weinberg*, (4th Cir., 1967) 384 F. 2d 471. This case is readily distinguishable in that it involves fees for an attorney for an assignee for the benefit of creditors which, of course, is not governed by General Order 44, but rather is governed by the same equitable principle under which fees are allowable to an assignee for the benefit of creditors, viz.: the equitable principle that services beneficial to a fund brought into a bankruptcy court should be compensated out of the fund. (Citing, *Randolph v. Scruggs*, (1903) 190 U.S. 533; *Flaxman v. Gardner*, (9th Cir., 1966) 353 F. 2d 764).

In *Fine v. Weinberg*, one Louis B. Fine, a member of the Norfolk law firm of Fine, Fine, Legum, Schwan & Fine, represented W. T. Byrns, Inc., as well as W. T. Byrns, individually. On June 11, 1965, he prepared an assignment for the benefit of creditors pursuant to which W. T. Byrns, Inc. assigned its assets to Andrew S. Fine, as assignee, the latter being a son of Louis B.

Fine, as well as a member of the same law firm. Thereafter, Andrew S. Fine, as assignee for the benefit of creditors, employed the services of his father as his attorney as assignee. Another attorney was retained to handle a special matter not material to the fee controversy. An assignee's sale was scheduled on June 24, 1965; however, one day prior thereto, several creditors filed an involuntary petition in bankruptcy against W. T. Byrns, Inc. The attorney for such creditors consented, in writing, to the assignee's sale provided the same be confirmed by the Bankruptcy Court. The sale was held and the sum of \$25,840.53, constituted the proceeds. The Bankruptcy Court approved the sale on June 30, 1965. After adjudication the Trustee apparently discovered that W. T. Byrns, president and sole shareholder of the W. T. Byrns corporation had withdrawn the sum of \$7,588.08 from the corporate bank account immediately prior to the execution of the assignment for the benefit of creditors, and the Bankruptcy Court thereafter entered an Order on April 27, 1966, directing W. T. Byrns to turn over to the Trustee in bankruptcy the aforesaid sum which he had withdrawn. The Bankruptcy Court found that there was insufficient time between the date of the assignment for the benefit of creditors and the date of the involuntary petition, within which Louis B. Fine could reasonably be expected to discover that Byrns had made the aforesaid withdrawal. The Court further found that when the conflict was discovered, Louis B. Fine and his firm withdrew as counsel for both the bankrupt corporation, as well as W. T. Byrns individually. The District Court in *In re W. T. Byrns, Inc.*, (D.C., Va. 1966) 260 F. Supp. 422, disallowed any fee to Louis B. Fine due to the conflict of interest even

though the fact of the conflict was unknown until *after* the services were rendered. The Fourth Circuit reversed the District Court apparently on the theory that “when the possibility of conflict grew into reality, he promptly withdrew his own, and his firm’s representation of any conflicting interest”.

While the foregoing case is readily distinguishable from the facts of the instant case, not only because General Order 44 is not involved, but, more significantly, because there, unlike the present case, the attorney had no knowledge of the conflict until *after* his services were completed, nevertheless, the case appears contrary in philosophy, if not in fact, to both the Supreme Court’s decision in the *Woods* case, *supra*, and this Court’s decision in the *Woodruff* case, *supra*. It further represents the type of equivocation based upon alleged “equitable considerations” which can only lead to the all too rapid erosion of the ethical principal prohibiting conflicts of interest.

In order to avoid unduly protracting this brief, the following are some of the factual distinctions between the instant case, and some of the cases cited by Appellant:

1. *Matter of Itemlab, Inc.*, (D.C., N.Y. 1966) 257 F. Supp. 764, is distinguishable as follows:

(a) The attorneys whose fees are involved were merely employed by the Trustee as Special Counsel and for a limited purpose only;

(b) Specifically, the attorneys were employed to invalidate a Chattel Mortgage, which they did, successfully. *After* the Chattel Mortgage had been invalidated, said attorneys’ other client, (one, Dutch),

asserted a lien as to those assets covered by the invalidated Chattel Mortgage. Thus, as to the matter for which they were employed by the Trustee, the interests of the Trustee and said attorneys' other client, Dutch, were identical, insofar as seeking, and obtaining the Order invalidating the Chattel Mortgage, and the dispute arose after the services were rendered to the Trustee.

While the foregoing distinctions are significant, nevertheless, candor requires the concession that this case also is philosophically contrary to the decisions in *Woods* and *Woodruff, supra*.

2. *Matter of Cal-Neva Lodge, Inc.*, (D.C., Nev. 1967) set forth in Appendix A to Appellant's brief, is distinguishable as follows:

(a) There was, in fact, no conflict of interest as between the stockholder, Adler, and the corporate debtor in possession, inasmuch as Adler had subordinated all of his claims against the corporation to those of *all* other corporate creditors. Accordingly, the attorneys' representation of both the corporate debtor and the principal stockholder, Adler, did not result in any conflict of interest.

3. *Chicago & West Town's Railway v. Friedman*, (7th Cir., 1956) 230 F. 2d 364, is distinguishable as follows:

(a) This was a Chapter X corporate reorganization proceeding as to which General Order 44 is inapplicable since it is limited to attorneys representing Receivers, Trustess, or Debtors in Possession. Instead, the case was governed by §242 of the Bankruptcy Act (11 U.S.C. §642)

(b) Perhaps more importantly, no conflict existed at the inception of the case nor for a number of years thereafter. Approximately six years after the case was filed, during which time the attorneys involved represented the Creditors' Committee, said attorneys, on behalf of an outside client, submitted an offer to purchase the majority of the debtor corporation railway's common stock. The Court granted the attorneys the reasonable value of their services rendered up to the time that their client submitted their purchase offer.

In contrast, in the instance case, not only did the conflict actually exist from the inception of the case, but Appellant knew, or should have known, of its existence, as properly found by the Referee.

4. In *In re Philadelphia & W. Ry. Co.*, (D.C., Pa. 1947) 73 F. Supp. 169, the following are distinguishable facts:

(a) This, again, was a Chapter X corporate reorganization in which General Order 44 is inapplicable;

(b) Perhaps most significantly, there was, in fact, no conflict of interest, and the Court distinguished the case from the Supreme Court's decision in the *Woods* case, *supra*, on the basis that in *Woods* there was, from the very beginning, an existing conflict between the indenture trustee and the bondholder committee, both of whom were represented by the same counsel. In contrast, in the *Philadelphia* case no conflict, in fact, ever developed, and as the Court stated at page 173:

"There is nothing in the opinion in the *Wood case* to suggest that where no actual conflict of

interest is shown to exist, the mere fact of representation of both indenture trustee and bondholder requires that compensation be denied.”

Here again, in the instant case, as in the *Woods* case, an actual conflict in fact existed at all times from and after the inception of the proceeding, and, in addition thereto, the fact of the conflict was known by, or should have been known to, Appellant.

It is submitted, by way of final summation, that the facts of the instant case far more strongly require disallowance than do the facts of any of the other decisions cited by either party to this controversy, and that allowance of Appellant's fee, in the face of the facts of the case, would require overruling the *Woodruff* case, and the reduction of General Order 44 to a meaningless succession of hollow words.

Conclusion.

It is respectfully submitted that the respective Orders of the Referee and the District Court below be affirmed for all of the reasons hereinabove stated.

Respectfully submitted,

JOSEPH S. POTTS,

Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. POTTS

EXHIBIT A.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

In the Matter of Haldeman Pipe & Supply Company, a California corporation, Debtor, No. 156,434-CC.

Filed June 15, 1967.

The present matter arises out of an Application for Compensation filed herein on or about May 6, 1966, by Haskell H. Grodberg, hereinafter referred to as "Grodberg", wherein said applicant prayed for an allowance of fees in the amount of \$15,500.00, for services rendered by him as attorney for A. J. Bumb, receiver of the above-entitled estate. That on June 3, 1966, the undersigned Referee in Bankruptcy, to whom the proceeding had been duly referred, and before whom all matters had been conducted, noticed a hearing for June 9, 1966, for purposes of receiving further evidence with respect to the aforementioned application of Grodberg for compensation.

Subsequent to the hearing of June 9, 1966, and on or about August 1, 1966, the undersigned caused to be filed and served his proposed Findings of Fact, Conclusions of Law, and an Order with respect to Grodberg's Application for Compensation. Thereafter, and pursuant to a written request therefor filed on behalf of Grodberg, further hearings thereon were conducted on November 14, 1966, December 2, 1966, and December 8, 1966, at all of which said hearings Grodberg appeared by his attorneys, Beardsley, Hufstedler & Kemble, by Charles E. Beardsley, Seth M. Hufsted-

ler, and Stephen R. Farrand, and the receiver, A. J. Bumb, appearing by his Special Counsel, Joseph S. Potts, and evidence both oral and documentary having been introduced, and the court having taken the matter under submission, and having further considered proposed Findings of Fact and Conclusions of Law submitted by both counsel for Grodberg and the receiver, on behalf of their respective clients, and good cause appearing therefor, the court hereby makes the following:

FINDINGS OF FACT

1. That the above-entitled proceeding was commenced on May 31, 1963, by the debtor's filing of a Petition for an Arrangement under the provisions of §322 of the Bankruptcy Act (11 U.S.C. §722).

2. That prior thereto, and on May 24, 1963, a meeting of the debtor's larger creditors was held, which was attended, among others, by one William Collen, hereinafter referred to as "Collen," of Collen, Kessler & Kadison, attorneys with offices in Chicago, Illinois, representing Manufacturers' Clearing House, forwarders of certain claims of creditors of the debtor, including the claim of American Radiator & Standard Sanitary Corporation, hereinafter referred to as "Amstan," for purposes of brevity; that Amstan then had a claim against the debtor in the sum of approximately \$120,000.00, of which \$100,000.00 had been personally guaranteed by Jack Manildi and his wife, Vina Gale Manildi.

3. That Jack Manildi was president, a director, and, with his wife, the sole stockholder of the debtor, and he was also president, a director, and, with his wife,

the sole stockholder of a second corporation, Santa Monica Plumbing & Supply Company. That there had been extensive business and credit transactions between the debtor and the last-named corporation prior to the filing of the debtor's petition herein.

4. That on May 28, 1963, Grodberg was contacted by telephone from Chicago, by Collen, who advised Grodberg that the debtor was reported to be considering filing a Petition for an Arrangement under Chapter XI of the Bankruptcy Act, and Collen requested Grodberg to represent those creditors who were represented by Collen's law firm, and to contact the debtor's attorney, Leonard A. Goldman, hereinafter referred to as "Goldman," for further details. That Grodberg agreed to Collen's requests, and thereafter contacted Goldman relative to the debtor's situation and intentions.

5. That on May 31, 1963, Goldman filed the debtor's Petition under Chapter XI, and immediately thereafter on the same day, in the presence of Grodberg, requested the undersigned Referee in Bankruptcy, to whom the proceeding had just been referred, to appoint a Receiver. That on said date, A. J. Bumb was appointed receiver, qualified on the same day, and has ever since been, and still is, the duly appointed, qualified and acting receiver of the above-entitled debtor's estate.

6. That subsequently, on May 31, 1963, at the receiver's request, Grodberg prepared an Application, for the signature of the receiver, for an order authorizing the receiver to employ Grodberg as his attorney, as well as an Affidavit, signed and sworn to by Grodberg,

which Affidavit recites, among other things, the following:

“ . . . ; that affiant represents certain unsecured creditors whose interests, so far as known to affiant, are identical to those of the receiver herein; that affiant does not represent any interest which is adverse to the receiver or to the creditors herein. . . . ”

That the aforesaid Application, prepared by Grodberg for the receiver's signature, states, among other things, that Grodberg “is duly qualified and experienced in bankruptcy matters such as are involved in the administration of this estate.” The order of employment, filed June 6, 1963, also prepared by Grodberg, recites that Grodberg was employed for the special and general purposes set out in the application of the receiver, which application, among other things, contains the following reasons or purposes for his employment:

“E. To examine witnesses under the provisions of Section 21-A(sic) of the Bankruptcy Act as the same may be found necessary or appropriate to ascertain facts and to determine if legal action should be taken to preserve assets of this estate *including by way of specification and not by way of limitation the relationships between the above-entitled debtor and subsidiary or connected corporations with specific reference to business transactions between them.* (Emphasis added.)

“F. To advise and assist applicant in the collection of accounts receivable and all other money, funds and property due and owing to the debtor as the same may be found necessary.

“G. To prepare on behalf of applicant necessary legal applications, answers, orders, reports and other papers.

“H. To confer with the Receiver rendering legal advice, and in general to render such other legal services as are usually rendered by attorneys for receivers in like proceedings.”

7. Neither the affidavit nor the application makes any reference to the fact that Grodberg represented Amstan, or that Amstan was the holder of a guarantee from the Manildis to the extent of \$100,000, or that Manildi was the president of the debtor, or that Manildi was a principal of Santa Monica Plumbing Supply Company, a debtor of Haldeman; or that Amstan (Collen) and Grodberg had discussed the matter of a suit against Manildi and of levies of attachment against his property. Each of these matters was known by Grodberg on June 4, 1963; and each of the matters, excepting possibly as to the guarantee, and the proposed suit and attachment were known on May 31, 1963, the date of the preparation by Grodberg of the application.

8. That subsequent to Grodberg's mailing to the receiver of the aforesaid Application for an order authorizing the receiver to employ Grodberg, and prior to June 6, 1963, the date on which the order was entered authorizing his employment as attorney for the receiver, Grodberg received a second telephone call from Collen in Chicago, on June 4, 1963, in the course of which Collen informed Grodberg that Amstan held personal guarantees of Mr. and Mrs. Manildi of the debtor's obligations to Amstan to the extent of \$100,000.00,

and Collen further requested Grodberg to file an action thereon at the earliest possible moment and in connection therewith to promptly levy attachments on certain parcels of real property standing in the names of the Manildis, and Collen further explained to Grodberg that the urgency of an immediate attachment stemmed from the facts (1) that certain other creditors of the debtor also held personal guarantees of the Manildis, and (2) that one creditor, Alabama Pipe Company, had already attached parcels of real property owned by the Manildis.

9. That on the following day, June 5, 1963, Collen forwarded a letter to Grodberg transmitting copies of the Manildi's guarantees of the debtor's obligations to Amstan, in which letter Collen reiterated the urgency of a prompt suit and attachment. That Grodberg received Collen's said letter on or before June 8, 1963, on which date he drafted a complaint against the Manildis and prepared the documents necessary to effectuate an attachment on their real property. That the aforesaid complaint was filed on June 10, 1963, and the levies of attachment were made shortly thereafter.

10. That at least some of the real property upon which Grodberg caused attachments to be levied was subsequently sought to be recovered by the receiver in his Superior Court Action No. 825,741, referred to in greater detail hereinbelow.

11. That also on June 4, 1963, after his telephone conversation with Collen, referred to in Paragraph 8 hereinabove, Grodberg mentioned in the presence of Goldman and the receiver, following a meeting at the Bank of America, that one of the creditors he repre-

sented held a personal guaranty executed by the Manildis; however, Grodberg said nothing to indicate that the receiver had any cause of action, or possible cause of action, against Mr. or Mrs. Manildi, or Santa Monica Plumbing & Supply Co., and Grodberg likewise did not inform the receiver that he then intended to file a lawsuit on behalf of Amstan against the Manildis, based upon their guaranty, and also intended to attach certain real property standing in the names of the Manildis in connection therewith.

12. That shortly prior to July 26, 1963, Goldberg, acting as attorney for the receiver, prepared an Application, which was signed by the receiver on the last mentioned date, in which Application there was sought authority to employ an auditor, among other reasons, to investigate transfers of real property and other assets of the debtor to Manildi and to Santa Monica Plumbing & Supply Co. That on or about July 29, 1963, an Order was entered based on said Application, authorizing the receiver's employment of one Albert Kramer, hereinafter referred to as "Kramer", a Public Accountant, for purposes of conducting the examinations and auditing work referred to in the receiver's Application.

13. That on August 19, 1963, in the course of a conference attended by the receiver, Grodberg, Kramer, and Hubert F. Laugharn, hereinafter referred to as "Laugharn", attorney for the creditors' committee, Kramer orally reported that, in his opinion, there were possible causes of action in favor of the receiver against the Minildis and Santa Monica Plumbing & Supply Co., based upon allegedly improper transfers or diversions of assets and real property of the debtor to said

potential defendants. At this time, Grodberg notified the receiver *for the first time*, that, as attorney for Amstan, he had sued the Manildis and attached real property standing in their names, and Grodberg further suggested that the receiver should employ other counsel to handle any claims or litigation on behalf of the receiver as against the Manildis or Santa Monica Plumbing & Supply Co.

14. Thereafter, and on or about August 30, 1963, the receiver employed Laugharn as Special Counsel to prepare and prosecute various causes of action against the Manildis and Santa Monica Plumbing & Supply Co. That on September 23, 1963, Laugharn filed, on the receiver's behalf, Los Angeles Superior Court Action No. 825,741, against Jack Manildi, Vina Gale Manildi, and Santa Monica Plumbing & Supply Co. Ultimately, this litigation was settled and compromised, pursuant to which the sum of \$32,000.00 was paid to the receiver out of the proceeds of sale of the assets of Santa Monica Plumbing & Supply Co.

15. That, although Grodberg obliquely mentioned that he represented a "guarantee" creditor during the course of one of several hearings in connection with the first meeting of creditors, the original of which was held on July 9, 1963, and although he further referred to the "Leland Trust" in favor of the "guarantee" creditors, in open court on September 3, 1963, nevertheless, he at no time made a direct statement to the court that he was representing an interest adverse to the receiver and the body of creditors generally, and the first time he suggested such possibility to the receiver was only after Kramer's oral report of August 19, 1963. That Grodberg never made, or even sug-

gested, any modification of his Affidavit, or the receiver's application.

16. That to avoid or minimize a "panic situation" affecting those creditors of the debtor holding personal guarantees of the Manildis, and to obviate a "race" as between them to first obtain attachment or execution liens on the Manildi's real property, negotiations were commenced in the latter part of June, 1963, between the several attorneys representing such "guarantee" creditors, including Grodberg, as attorney for Amstan, and Manildi and his personal attorney, William J. Tiernan. As a culmination of these negotiations there was created a guarantee creditors' trust, referred to as the "Leland Trust", pursuant to which it was provided that the "guarantee" creditors were to share proportionally to the extent of fifty per cent (50%) of their respective claims, without interest, in the proceedings of sale of the Manildi's real property, which had previously been attached by some or all of the "guarantee" creditors, and which said real property constituted the trust corpus. Said trust further provided that the "guarantee" creditors were further to receive an additional sum, not to exceed twenty-five per cent (25%), of their respective claims, in the form of dividends payable out of the debtor's estate herein, subject to the further proviso that any surplus over the aforementioned percentages, which might be received by the "guarantee" creditors, would be paid by them to the Manildis, who were also to be thereby released from any further liability under their guarantees.

17. That the provisions of the aforesaid "Leland Trust" were recognized and approved by the Order of September 27, 1963, confirming the debtor's plan of

arrangement. Said Order further reserved to the receiver all rights as against the Minildis and Santa Monica Plumbing & Supply Co. theretofore asserted in Los Angeles Superior Court Action No. 825,741.

18. That Grodberg received a total of \$8,650.00 from Amstan for legal services rendered in connection with the suit he filed on its behalf against the Manildis, and the concomitant attachments of the latters' real property, and in participating on Amstan's behalf, in the negotiations culminating in the creation of the "Leland Trust".

19. That during the course of his representation of the receiver herein, Grodberg performed legal services, not involving matters relating to the Manildis, Santa Monica Plumbing & Supply Co., or other matters asserted in connection with Los Angeles Superior Court Action No. 825,741, for which he claims compensation in the amount of \$15,500.00, the fair and reasonable value for which the Court finds is in the sum of \$12,500.00.

20. That on May 31, 1963, at which time Grodberg prepared his Affidavit and the Application and Order authorizing his employment as attorney for the receiver herein, there was, in fact, an actual, if not yet known, conflict of interest as between the receiver, on the one hand, and Amstan, on the other hand.

21. That on or before June 6, 1963, the date of entry of the Order authorizing his employment as attorney for the receiver, Grodberg actually knew, or should have known, that his representation of the receiver then was, or would be, or, at least, might become, in substantial conflict with his representation of Amstan.

22. That Grodberg's representation of Amstan, in connection with which he sought to recover from the Manildis, was in substantial conflict with the receiver's possible rights to recovery from the Manildis.

23. That Amstan's levy of attachment on real property standing in the names of the Manildis reduced, and militated against, the receiver's ability to effect collection of any claim or cause of action he may have had against the Manildis.

24. That Grodberg's representation of Amstan rendered it improbable that he would advise the receiver that an involuntary petition in bankruptcy against the Manildis should be considered, and, if possible, filed, so as to avoid the various attachments levied by the "guarantee" creditors, including Amstan, on real property standing in the names of the Manildis.

25. That Grodberg's representation of Amstan further rendered it improbable that he would effectively advise the receiver in relation to any possible course of action which might conflict with, or impede, the prior and secured position of Amstan in relation to the Manildi real property, or otherwise.

From the foregoing Findings of Fact, the Court hereby makes the following:

CONCLUSIONS OF LAW

1. That on May 31, 1963, at which time Grodberg prepared his Affidavit and the Application and Order authorizing his employment as attorney for the receiver herein, there was, in fact, an actual, if not yet known, conflict of interest as between the receiver, on the one hand, and Amstan, on the other hand.

2. That on or before June 6, 1963, the date of entry of the Order authorizing his employment as attorney for the receiver, Grodberg actually knew, or should have known, that his representation of the receiver then was, or would be, or, at least, might become, in substantial conflict with his representation of Amstan.

3. That Grodberg's representation of Amstan, in connection with which he sought to recover from the Manildis, was in substantial conflict with the receiver's possible rights to recovery from the Manildis.

4. That Amstan's levy of attachment on real property standing in the names of the Manildis reduced, and militated against, the receiver's ability to effect collection of any claim or cause of action he may have had against the Manildis.

5. That Grodberg's original, and continuing, failure to set out in his Affidavit the facts respecting his representation of Amstan, its claims against the Manildis, and the relationships between the Manildis, Santa Monica Plumbing & Supply Co. and the debtor, constitutes a substantial violation of, and non-compliance with, the provisions of General Order 44 (11 U.S.C. following §53), which requires disallowance of any compensation to which he might otherwise be entitled as attorney for the receiver herein.

Dated: This 15 day of June, 1967.

/s/ RUSSELL B. SEYMOUR

Russell B. Seymour

Referee in Bankruptcy

No. 22537

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AUG 10 1968

In the Matter of

HALDEMAN PIPE & SUPPLY COMPANY, a corporation,
Debtor.

On Appeal From the United States District Court for the
Central District of California.

APPELLANT'S REPLY BRIEF.

BEARDSLEY, HUFSTEDLER & KEMBLE,

By SETH M. HUFSTEDLER,

458 South Spring Street,
Los Angeles, Calif. 90013,

*Attorneys for Appellant,
Haskell H. Grodberg.*

FILED

AUG 8 1968

WM. B. LUCK, JR.

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HALDEMAN PIPE & SUPPLY COMPANY, a corporation,
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APPELLANT'S REPLY BRIEF.

I.

There Is No Finding of Fact That Appellant Knew of a Possible Suit by the Receiver Against Manildi, Upon the Filing of His Affidavit for Employment by the Receiver.

1. Appellee's Brief Erroneously Suggests That Appellant Was Found to Have Knowledge of a Possible Cause of Action Against Mr. or Mrs. Manildi at the Time of Filing the Affidavit in Conjunction With His Employment.

An examination of the two briefs previously filed herein show that the parties are in agreement on at least (and almost only) one thing: it is a matter of major importance whether or not appellant knew (or was in a position to be charged with knowledge) that the receiver might have a cause of action against Mr. and Mrs. Manildi.

Appellee is so flat-footedly positive in his repetition of the proposition that one's suspicion is immediately aroused as to its accuracy. At pages 20 and 21 of his brief, his answer to virtually every argument of appellant is that he "knew or should have known" that there existed a "conflict of interest *ab initio*" (see paragraphs 1, 2, 3, 5 and 6.) More specifically, on page 20 (paragraph 2) he states precisely what he means: "Appellant knew, or should have known, (1) that there were possible causes of action in favor of the Receiver against Santa Monica and the Manildis. . . ."

We agree with appellee that such a finding is critical to his case. Mere repetition, however, will not prove his point.

The Referee was much more limited in his findings. He found that on May 31, 1963, "There was in fact, an actual, *if not yet known*, conflict of interest between the receiver, on the one hand, and Amstan, on the other" [Concl. of Law, 1 and Find. 20; emphasis added.]

Clearly, then, the Referee did not find that appellant knew of an actual conflict. To the contrary, he recognizes that it might not be known.

The Referee spelled out what he meant in the next finding and conclusion:

"[O]n or before June 6, 1963 . . ., Grodberg actually knew, or *should have known*, that his representation of the receiver was then, or *would be, or at least might become*, in substantial conflict with his representation of Amstan." [Find. 21; Concl. 2; emphasis added.]

Thus one of the possible alternative findings (which must justify the order or it is invalid) is that on June 6, 1963, Appellant *should have known* that his representation of the Receiver *might become* in conflict with his representation of Amstan.

As the Opening Brief shows, General Order 44 now contemplates that an attorney may represent a receiver even though he represents a creditor, and the interests of the parties "might become" in conflict, as, for example, where the claim of the creditor is challenged or reexamined.

Furthermore, all of the Appellee's assertions about the status of knowledge of Appellant regarding a claim against Manildi are only that: assertions by appellee, not findings by the Referee. The Referee made it quite clear as to what he found. He said appellant knew these things on June 4, 1963:

1. Grodberg represented Amstan;
2. Amstan held a guarantee from the Manildis up to \$100,000.00.
3. Manildi was president of debtor;
4. Manildi was "a principal of Santa Monica".
5. Amstan and Grodberg had discussed a suit by Amstan against Manildi and levies of attachment against his property. [Find. 7.]

The missing link, supplied only by unsupported repetition and italics by appellee is that appellant should have anticipated wrongdoing by Manildi solely because he was "president" of debtor and "a principal" of Santa Monica, and that the wrongdoing was such that it would give the debtor (and hence the Receiver) an ultimate right to levy on Manildi's property.

The Referee clearly avoided making any such finding, and there are no facts in the record to support such speculation.

On the contrary, Mr. Leonard Goldman, the attorney for the debtor and Manildi flatly declared:

"For the record, there could not have been, in my opinion, the possibility of any outward appearance of any adversity." [Rep. Tr., June 9, 1966, p. 39, lines 21-23.]

Furthermore, the record shows that the Referee did not intend to find that Appellant knew that there might be a cause of action against Manildi. Thus, the Referee specifically states

“the point I am trying to get at is, what is the effect of representing . . . let’s assume for the moment . . . of in fact representing an adverse interest even though you might not know about it? That is what I am getting at.” [Rep. Tr., June 9, 1966, p. 41, lines 12-15.]

Again, on this subject, the Referee stated:

“. . . I think that every intendment should be used, not in favor of the person who at one time or another discovers he has an adverse interest undisclosed to the court, but it should be pursued in the other direction, and I am talking now of the situation today, the order authorizing the employment is filed and there is an affidavit ‘I represent no adverse interest’. And two months from now, or three months from now, or some other time it develops as a matter of fact. *Now, don’t misunderstand; I am not suggesting a matter of knowledge in the inception, but as a matter of fact he does represent adverse interests.*” [Emphasis supplied; Rep. Tr., June 9, 1966, p. 31, lines 4-18.]

Consistent with the foregoing preliminary comments, in making his specific Findings of Fact on the subject of appellant’s knowledge, the Court significantly did not find that Appellant had any knowledge of the possibility of a suit by the Receiver against Manildi on the critical dates of May 31, 1963 and June 4, 1963. [All of the specific Findings as respect appellant’s knowledge in this regard are set forth in the last sentence of Find. 7, discussed above.]

With respect to the “knowledge” aspect of the matter, General Order 44 is clear. It does not ask the impossible. It simply requires the verified petition for appointment of an attorney for a receiver to set forth the attorney’s specified connections “to the best of petitioner’s knowledge”. It does not demand that such petition or affidavit set forth what the applicant “should have known” or what “would be, or, at least, might become”, in the future, but which the Referee apparently requires by Conclusion 2.

It, therefore, is submitted that in the first place, the Finding of Fact actually made with respect to appellant’s knowledge, to wit, Finding of Fact 7 referred to above, does not support any Conclusion of Law that there was any knowledge of any actual conflict, in view of the fact that there is no Finding of the existence of an indispensable element requisite to the alleged conflict envisaged, namely, knowledge of the existence of a suit in favor of the Receiver and purportedly in conflict with a suit in favor of Amstan against the same third party. On the contrary, by the omission of such a Finding of Fact, such alleged knowledge must be deemed found not to have existed.

Furthermore, not only is said Conclusion of Law 2 unsupported by the Findings of Fact, but said Conclusion by holding that Appellant “*should have known that his representation of the Receiver then was, or would be, or, at least, might become, in substantial conflict with his representation of Amstan*” goes far beyond the express and limited provisions of General Order 44. It engrafts upon the first sentence of General Order 44 requirements not merely of what was actually known “to the best of petitioner’s knowledge”, but requires sheer speculation as to what one “should have known” as to “what would be, or, at least, might become” in the future.

Finding of Fact No. 7 significantly omits any Finding of any knowledge of a possible cause of action by the Receiver against the Manildis.

In an effort to overcome this defect, and in an obvious attempt to add additional findings of fact which have not been made, Appellee's Brief exaggerates the extent of the "knowledge" actually found by urging this Court to "infer" additional findings from Conclusion of Law 2, either simply because such Conclusion of law was set forth, or because said conclusion of law is also designated as a Finding of Fact, numbered 21. It is erroneous for such additional and unexpressed finding of fact to be so "inferred".

2. Findings of Fact Cannot Be "Inferred" Either From Other Findings of Fact or From Conclusions of Law as Urged by Appellee.

The general proposition that a Referee's findings of fact are to be accepted unless "clearly erroneous" is undisputed as a general rule.

This does not mean, however, that an appellee may infer new findings of fact—not made by the trial court, from its conclusions of law. As this Court pointed out in *Lundgren v. Freeman*, 307 F. 2d 104, 115 (9th Cir. 1962), ". . . courts of appeal need give no weight to a trial court's conclusions of law;" thus "inferences derived from the application of a legal standard" may be disregarded. Similarly, in *Official Creditor's Committee v. Ely*, 337 F. 2d 461, 467 (9th Cir. 1964), this Court held that "conclusions of law, ultimate findings, or mixed findings of fact and law are not binding upon a court of review."

Thus, with respect to the so-called "Findings of Fact" numbered 20, 21, 22, and 23, the same have been exactly repeated and frankly designated by the

Referee and adopted by the District Court as Conclusions of Law numbered 1, 2, 3, and 4, respectively. The trial court here limited its findings of fact with respect to the "knowledge" of the appellant at and before the time of his appointment to those set forth in Finding of Fact 7. So-called Finding of Fact 21, actually a Conclusion of Law, and designated as such as Conclusion of Law 2, is a determination based upon Finding of Fact 7, and such determination is one which, pursuant to the authorities above cited, the reviewing court is neither bound by in any respect, and which it is at full liberty to reject out of hand with the correct conclusion of law of its own.

Appellee's contention that appellant had knowledge, at or before the time of his appointment, of the possibility of a suit in favor of the Receiver and against Manildi, is not based on a finding of fact, but rather on inferences which Appellee itself draws solely from Conclusion of Law 2. [Find. 21.] This not only flies in the face of the Referee's own Conclusion of Law 1 [also designated Find. 20] that there was an allegedly actual "*if not yet known*" conflict of interest as between the Receiver, on the one hand, and Amstan, on the other hand (emphasis supplied), but also of the Referee's significant omission of any such specific finding of ultimate facts in Finding of Fact 7.

3. All "Credible Evidence" Supports the Referee's Position in Refusing to Find Knowledge on the Part of Appellant of a Possible Suit by the Receiver Against Manildi When Appellant Was Appointed Attorney for the Receiver.

As if in the hope that mere reiteration of a contention will make it true, the Appellee's Brief repeatedly claims that "credible evidence" supports a finding that appellant "knew, or should have known" that the Receiver

had or might have had a lawsuit against the Manildis, even before appellant's employment. Upon examination of what Appellee's Brief cites in support thereof, however, it is clear that there is no such "credible evidence" at all. The reference (in Appellee's Br. p. 24) to paragraph E of the Receiver's application to employ appellant as counsel [transcript of record, pp. 10-12, incl.] relates not to matters involving the Manildis individually, but to relationships between the debtor and a related corporation, Santa Monica Plumbing & Supply Company. Likewise, the references to the June 9, 1966 and the November 14, 1966 Transcript, quoted in Appellee's Brief (pp. 25 and 26), again expressly refer to claims not against the Manildis individually, but rather to claims against said corporation, Santa Monica Plumbing & Supply Company. In addition to the fact that claims against a corporate entity, not the Manildis individually, were involved, appellee's brief conveniently omits the qualifying paragraph which immediately precedes the said reference to the June 9, 1966 transcript, which sets the time for the first acquisition of knowledge of the possibility of a conflict.

"The first time that it seemed to me that a potential conflict might arise insofar as my representation of the Receiver is concerned, was a *result* of investigations which were initiated during the course of the receivership with respect to the interrelations between Haldeman and Santa Monica Pipe & Supply Company, the Santa Monica Company." [Emphasis supplied; appellant's testimony, Rep. Tr., June 9, 1966, p. 10, lines 11-17.]

The mere fact that a receiver may have a creditor's claim against a corporation of which an individual is a "principal" certainly is no basis for *ipso facto* assuming that the receiver necessarily has a lawsuit against such principal individually. But the appellee's brief goes

even further; it apparently contends in all seriousness, that because Item E of the affidavit referred to the examination of witnesses under §21(a), that "it must be held that the contemplated examinations would include an examination of Manildi as the representative of the debtor, and that such examinations properly conducted would inevitably lead to the causes of action in case. No. 825741." (by the *Receiver v. Manildi, et al.*) From this, appellee's brief reasons that appellant must have all along known what the results of such future examinations would be, and therefore, is chargeable before the event with knowledge of such examinations which had not yet occurred.

Of course appellant is not chargeable with what developed on interrogation—which, incidentally, is not in the record. *Furthermore, no one ever established, and this record does not show, that the Receiver had at any time a bona fide claim against Manildi.*

The actual evidence shows appellant had no knowledge of such alleged claim prior to his employment as attorney for the Receiver. Appellant's testimony under the most persistent of cross-examination, was clear that when the Affidavit and Application for his employment was prepared and filed, and for many weeks thereafter, he knew of no facts and had no cause to believe that the Receiver had any possible claim against the Manildis individually.

He did not have information which would cause him to suspect either that the real property standing in Manildi's name was not Manildi's, or that it was subject to any claims against him. [Rep. Tr., June 9, 1966, p. 8, lines 12-18.] Appellant testified that long afterwards, on August 19, 1963, upon the oral report of the accountant Kramer respecting his investigation of the relationship between Haldeman and Santa Monica,

giving rise to what even then were mere "suspicions" in the accountant's mind, that as the result of such investigation, it seemed to him for "the first time" that a potential conflict might arise by virtue of a possible suit against the Manildis individually. [Rep. Tr. June 9, 1966, Hearing, p. 10, lines 11-17.]

Again, at page 12, lines 6 through 10 of said Transcript, he testified:

"Now the accountant started his investigation. As a result of his investigation, he became suspicious of whether or not not only there had been a diversion of assets from Haldeman to Santa Monica, but questioned the business relationship between Manildi as an individual and Haldeman". [See also, Rep. Tr., June 9, 1966, p. 13, lines 10-15, p. 15, lines 1-8, and p. 51, lines 4-10.]

It has never been shown that the claim became more than "suspicions." The facts were never developed in this record on which the claim and lawsuit were based.

Nevertheless, appellant testified that immediately after the accountant's oral report, Appellant spoke personally with the Receiver and "I put it to him and he agreed with me that I did not know if it was going to develop that there were any claims in favor of the Receiver against Manildi." [Rep. Tr. p. 15, lines 12-15.] Again, the witness testified that he nevertheless then immediately withdrew from representing the Receiver in reference to the Manildis "as soon as I saw what I believed was a potential claim . . . and apparently there was not any claim, in fact." [Rep. Tr. p. 21, line 19, to p. 22, line 3.]

The surrounding facts and circumstances evidence the truth of the assertion that appellant had no knowledge of the possibility of a suit or possible suit against the Manildis individually in favor of the Receiver.

The first day Appellant had ever represented any of the creditors who had been referred to him in connection with the Haldeman case was on May 28, 1963. A mere three days later, namely, May 31, 1963, the Receiver requested appellant to represent him also, and it was on that day that appellant drafted the Attorney Affidavit. Whatever knowledge appellant had concerning the case at the time of drafting the Affidavit was gained during said brief interim period. This knowledge was gained specifically from one telephone call from William Collen, his referring Chicago counsel; two telephone discussions with Leonard Goldman, the attorney representing Haldeman, and also (at that time) Manildi; and one conference in Chambers with Mr. Goldman and the Referee on May 31, 1963, when Mr. Goldman related the general status of the case to appellant and to the Referee. [November 14-December 2, 1966, Rep. Tr. p. 17, line 22, to p. 18, line 14; p. 19, lines 4-24; p. 44, line 1, to p. 45, line 13.] There is no evidence at all that any facts were brought to appellant's knowledge which in any respect would even indicate the possibility of a cause of action or possible cause of action of the Receiver against Mr. and Mrs. Manildi individually, much less that appellant had any knowledge of such. The circumstances of appellant's recent and brief introduction to the case are forceful proof of the absence of such "knowledge".

Although certainly appellant was shortly thereafter apprised that one of his new creditor clients, Amstan, had a claim against Manildi individually arising from a guarantee, this certainly does not mean that he was thereby given any reason at all to believe that the Receiver also had a cause of action or "possible cause of action" against Manildi. Certainly if the Receiver, himself an experienced attorney at law, had given appellant any such knowledge, directly or indirectly, prior to the

time appellant withdrew as the Receiver's counsel in respect to the Manildis upon the making of the accountant's report on August 19, 1963, in such event the Receiver would surely have so testified in these proceedings. It is noteworthy that the Receiver never so testified, and never testified that he placed any information in appellant's hands, directly or indirectly, which would have given knowledge of a possible cause of action by the Receiver against the Manildis.

That appellant had no knowledge of a possible cause of action of the Receiver against the Manildis before the accountant voiced his suspicions on August 19, 1963 is also established by the testimony of Attorney Leonard Goldman, who at the critical times in question represented both the debtor Haldeman and its president, Manildi, individually.

Mr. Goldman made it clear:

“For the record, there could not have been, in my opinion, the possibility of any outward appearance of any adversity.” [Rep. Tr., June 9, 1966, p. 39, line 12, to p. 41, line 7, especially at p. 39, lines 21-23.]

Indeed, Mr. Goldman testified that he himself first learned that there was a possibility of a claim against the Manildis some time in August 1963 when Mr. Kramer came in with his report. [Rep. Tr., Nov. 14, 1966, p. 62, line 17, to p. 63, line 1.]

If the very attorney who actually represented Haldeman and the Manildis at the critical times himself did not know of a cause of action or possible cause of action in favor of the Receiver against the Manildis, it is overwhelmingly clear that appellant with his recent acquaintance with and limited knowledge of the facts of the situation, certainly could not and did not have any prior

knowledge that the Receiver might have a possible cause of action against Manildi.

From the foregoing, it is abundantly clear that the evidence does not in the slightest support the so-called “inferences” which Appellee’s brief would draw from the Conclusions of Law.

II.

In Failing to Decide on the Basis of Actual Conflict, and Instead Deciding the Case on the Basis of a Possible Conflict, the Referee and the District Court Held Contrary to Statute, Rule and Precedent.

- 1. An Attorney’s Representation of More Than One Creditor Against the Same Debtor Does Not Ipso Facto Mean That He Is Representing at the Same Time Conflicting Interests.**

Appellee’s Brief professes the belief that, when appellant points out that there in fact was no conflict of interest that this is now done belatedly. Such is not the case. On the contrary, at the very outset of taking testimony upon the within fee application, the absence of any genuine conflict in fact was stressed. [Rep. Tr., June 9, 1966, p. 4, line 26, to p. 5, line 9; p. 5, lines 16-21.]

Implicit throughout Appellee’s Brief, and Conclusions of Law 3 and 4 [also designated, respectively, as Finds. 22 and 23] is the assumption that an attorney representing more than one creditor against the same debtor at the same time *ipso facto* represents conflicting interests. However, conflict is not necessarily inherent in this situation. Indeed, it is common in commercial practice for individual creditors, creditor groups, collection agencies, and/or credit associations to band together and retain the same attorney to prosecute the claims of two or more creditors jointly against

the same individual debtor. This is often done in bankruptcy proceedings particularly. This practice is followed frequently because mutual creditor interests can in this way often be most economically and efficiently advanced. Thus, simply because appellant had been representing Amstan in reference to its claim against Manildi individually did not in and of itself mean that thereafter, when the possibility of the Receiver having a claim against Manildi was suspected by the accountant Kramer in August of 1963, that this meant a conflict of interest necessarily existed between the Receiver and Amstan. Depending upon the facts of the particular case and the facts which might thereafter develop, as *In the Matter of ItemLab*, 257 F. Supp. 764 (E.D. N.Y., 1966) their interests might well have been found concurrent and mutual, not conflicting. Therefore, the lower Court could not infer any knowledge of a conflict solely from the relationship of the parties.

The attachment levied by appellant on behalf of Amstan against the Manildis does not show that the appellant acted against the interests of the receiver. That attachment was levied shortly after June 10, 1963 [Find. 9], long before suspicion of a possible claim by the Receiver against the Manildis arose. The fact that the lower Court concluded [Concl. 4] that this attachment "reduced, and militated against" the Receiver's enforcement of "any claim or cause of action he may have had against the Manildis" is therefore irrelevant.

Further, said conclusion is not supported by any finding of fact. There is no showing the Manildis were insolvent. On the contrary, when the Receiver settled his claim against them, they paid nothing and excess funds were returned to them. [Clk. Tr. p. 88, lines 12-28.] The uncontradicted evidence showed that Manildi had substantial excess assets. [Ex. 1, p. 3; testimony of Mr. Goldman, his attorney, Rep. Tr., Nov. 14, 1966, p. 65,

line 26 to p. 66, line 3, and p. 66, line 16 to p. 67, line 2.]

It is apparent from the above that the lower Court's decision was not based on the proposition that the appellant knowingly acted against the interests of the receiver.

The Referee himself pointed this up in his comments appearing in the Reporter's Transcript of the June 9, 1966 hearing. The Referee stated:

"I am not too concerned about the fact that Mr. Grodberg did represent the Trustee (sic) on any matter where there was a specific or an adverse interest, *I don't think that he did that*. The point I am trying to get at is, what is the effect of representing—let's assume for the moment—of in fact representing an adverse interest even though you might not know about it? That is what I am getting at." (emphasis supplied.) [Rep. Tr., June 6, 1966, p. 41, lines 8-15.]

Of especial importance is the fact that the one case cited by the Referee in support of the position ultimately taken by him in this regard, and which case was quoted approvingly and at length by him in his Memorandum Opinion [Clk. Tr. pp. 150-151] has, since the rendering of said Opinion, been reversed by a higher court. *In re Byrns, Inc.*, 260 F. Supp. 442 (E.D. Va., 1966); *reversed*, *Fine v. Weinberg*, 384 F. 2d 471 (4th Cir. 1967).

In his "Memorandum re Application for Compensation, etc." [Clk. Tr. p. 150, line 26] the Referee states that

"the case of *In Matter of W. T. Byrns, Inc.*, 260 F. Supp. 442, points up the proposition that a discovery of an adverse position, even though made after the rendition of services, will prevent the payment for such services."

After quoting at length from the decision in said *Matter of Byrns*, the Referee concludes at page 14, lines 4 through 8 of his said Memorandum:

“It would be my view that an attorney who represents one or more general creditors takes the risk of the penalties imposed by General Order 44 (11 USCA following Section 53) if, thereafter, adverse positions should develop in respect to any of the claims represented by him.”

Appellee's Brief states that “we feel compelled to bring to the Court's attention” the recent case of *Fine v. Weinberg*, 384 F. 2d 471 (4th Cir., 1967), which Appellee's Brief concedes now “appears contrary in philosophy” to the contentions urged in said Brief in support of the Referee's position just described. However Appellee's Brief does not point out that *Fine v. Weinberg* reversed the District Court holding previously made in said case *sub nom. In the Matter of W. T. Byrns*, upon which, as above stated, the Reeree and apparently the District Court so relied in reaching the decision which they did.

The Court of Appeals in *Fine v. Weinberg* held that there is no inherent conflict of interest arising from the relationship between a bankrupt corporation and its president and sole shareholder, such as to constitute a prohibition against the same attorney representing, at the same time, said president and sole shareholder on the one hand, and the trustee of the bankrupt corporation (under a deed of assignment) on the other hand. Such an attorney was allowed reasonable com-

pensation for services rendered to such trustee out of assets of the estate of the debtor corporation in its subsequently ensuing bankruptcy proceedings.

The court, in holding that he was entitled to such compensation, stated:

“We accept and fully approve the teaching of Canon 6, (of the American Bar Association) yet we think it of doubtful application here. Louis B. Fine (the attorney) did not place himself in a position of conflict between the corporation and the creditors under the deed of assignment. When the possibility of conflict grew into reality, he promptly withdrew his own and his firm’s representation of any conflicting interest.”

Accordingly, the appellate court ordered that his fees be allowed, and reversed the District Court holding of *In re W. T. Byrns, Inc.*, 260 F. Supp. 242 (E.D. Va. 1966). *Fine v. Weinberg*, 384 F. 2d 471 (4th Cir. 1967).

Adherence by the Referee and the District Court to the erroneous view of *In re Byrns* incidentally has a further deleterious result with respect to General Order 44. “Shall have represented,” even if unknowingly, as interpreted by the Referee and adopted by the District Court, would render meaningless the qualification “to the best of petitioner’s knowledge” for the requirements in the Attorney Affidavit.

III.

In Declaring a Forfeiture by Appellant of All Fees Earned as the Receiver's Attorney in Unrelated Matters in This Estate, the Lower Court Abused Any Discretion It May Have Had Under General Order 44, and the Cases Cited by the Appellee Are Clearly Distinguishable.

Even if an attorney for a receiver "shall have represented any interest adverse to the receiver . . . *in any matter upon which he is employed for such receiver,*" which, as shown above, was not the situation in the case at bar, nevertheless General Order 44 does not "require" disallowance of all fees earned by such attorney as urged in Appellee's Brief and concluded by the Referee and the District Court. [Concl. of Law 5.] General Order 44 expressly makes disallowance purely discretionary, by the use of the language "the court *may* deny the allowance of any fee to such attorney". (Emphasis added.)

It has been held that even where a theoretical conflict generally existed, an attorney should not be deprived of compensation for services where he did not in fact work against the interests of the estate. *In re Barceloux*, 74 F.2d 288, 294 (9th Cir. 1935).

In appellee's citation of a number of cases in his Brief, appellee has confused said permissive authority granted by General Order 44 with the mandatory provisions of a separate and distinct section of the Bankruptcy Act, to wit: Section 62d of the Bankruptcy Act. In prohibiting the practice of splitting fees in bankruptcy proceedings, Congress provided in said Section 62d:

"If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person con-

trary to the provisions of subdivision c of this Section, the court *shall* withhold all compensation from such petitioner." (Emphasis supplied; Bankruptcy Act, Section 62d.)

Thus, a number of the cases cited by appellee in his Brief must be distinguished for the simple reason that they involve an application not of the discretionary provisions of General Order 44, but on the contrary, invoked the mandatory provisions of the fee-splitting ban of Section 62d. Such was the case in *Albers v. Dickinson*, 127 F. 2d 957 (8th Cir. 1942); *Weil v. Neary*, (1929) 278 U.S. 160, 49 S. Ct. 144, 73 L. Ed. 243; and *Stratton v. New*, 51 F. 2d at 984 (2nd Cir. 1931).

Thus, one of the books of authority cited in Appellee's Brief in pointing out the discretionary aspects of General Order 44 emphasizes that said discretion should be exercised fairly, rather than harshly.

"General Order 44 does not make forfeiture of compensation or expenses mandatory. Where the attorney for a receiver or trustee has represented an adverse interest without disclosing it, the court *may* disallow compensation or reimbursement, or both . . ." (3A Collier on Bankruptcy 1471; emphasis added.)

"Altogether it would seem that the careful distinction drawn by the law between mandatory (62d) and discretionary forfeiture (General Order 44) should be duly respected. Unless local rules expressly surrender their discretionary powers as to the particular case by adopting a general and unconditional mandatory rule declaring allowances forfeited for contravention of the rules relating to the appointment of attorneys for the estate, compensation for beneficial services actually rendered

should not be disallowed where at least the spirit of General Order 44 was honestly complied with. In fact, denial of compensation or reimbursement is a sanction distinctly punitive in character and should be reserved to cases warranting a moral censure. . . ." (3 A *Collier on Bankruptcy* 147.)

An instance where denial of all fees was compelled by reason of such a mandatory local rule is cited in Appellee's Brief namely, *Stratton v. New*, 51 F.2d 984 (2nd Cir., 1931). Local Rule 4 of that court prohibited attorneys for an officer of the bankrupt from also representing a receiver, or moving for the receiver's appointment. This had been violated and such rule provided that no such attorney should "receive any compensation". No such local rule is involved in the case at bar.

Other cases cited by appellee, unlike the case at bar, also involved situations where the claim of a creditor was directly and necessarily under known attack by the receiver or trustee by whom the creditor's attorney was also employed. Thus, *In re Westmoreland*, 270 F. Supp. 408, 411 (D. Ga. 1967) was a case where the attorney for the debtor also represented a corporate creditor claimant in the same proceeding. This is an inherently conflicting relationship, which *ipso facto* disqualifies dual representation, and is not excepted under Section 44 of the Bankruptcy Act, which on the contrary permits dual representation of both the receiver and a general creditor, as in the present case.

Although Appellee's Brief contends that certain of the cases cited in Appellant's Opening Brief are distinguishable because they involved Chapter X proceed-

ings, the case of *Woods v. City Nat'l. Bank & Savings of Chicago*, (1941) 312 U.S. 262, 61 S. Ct. 493, 85 L. Ed. 820, relied upon by Appellee also was a Chapter X proceeding. Said case, along with *In re Woodruff*, 121 F. 2d 152 (9th Cir. 1941) has already been distinguished in Appellant's Opening Brief at pages 26 through 31 thereof, to which reference is again made. Among other things, in said cited cases, at the time of appointment, there were existing conflicts between the estates and the respective attorneys' creditor clients, which disputes were already in progress and fully known, and not, as in the instant case, as yet unknown "possible" conflicts which might arise at some future time after the dual representation was undertaken.

The cases of *Matter of Eureka Upholstering Co., Inc.*, 48 F. 2d 95 (2nd Cir. 1931); *Albers v. Dickinson*, 127 F. 2d 957 (8th Cir. 1942) and possibly *Weil v. Neary*, (1929) 278 U.S. 160, are cases distinguishable in that in said instances there was no initial Order of the Court actually appointing the attorney claiming fees as attorney for the trustee or receiver. Such attorneys, being volunteers without official status, are, of course, ineligible for compensation from the bankrupt estates. Appellee's Brief makes much of the strong language used in the last-mentioned case, which arose in reference to the denial of fees under Section 62d. It should be noted, however, that the Chief Justice was applying said strong language particularly to the evils of fee-splitting, upon the basis of which denial of fees is mandatory. In spite of this, it has elsewhere been noted, in respect to *Weil v. Neary*, *supra*, that the Supreme Court nevertheless in fact did not deny all com-

pensation to the attorneys in the case. This is pointed out in *Crites, Inc. v. Prudential Ins. Co.*, 134 F. 2d 925 (6th Cir. 1943), where it was held that where the party complaining of the allowance of fees to said attorneys from the estate had stood by for years doing nothing about the active representation by the attorneys of opposing interests, even where the attorneys and the receiver had a fee-splitting arrangement, the court, having in mind that *Weil v. Neary*, *supra*, did not totally disallow compensation, permitted partial compensation for beneficial services rendered.

A fortiori then, the further comment appearing in Collier on Bankruptcy is here appropriate:

“Even when it has been thought that a creditor’s attorney represented an interest adverse to the bankrupt estate, it has usually been held that such dual association would not operate to deny him fair compensation for services which inured to the benefit of the estate.” (2 *Collier on Bankruptcy* 1686.)

Reference has already been made in Appellant’s Opening Brief to the cases of *Item Lab* (at pp. 38-41), *Cal-Neva Lodge* (Appendix A, and pp. 24-26, and 41-42), *Chicago & Westtown Railway* (at pp. 58-60), and *In re Philadelphia & Western Railway* (at pp. 29-31, and 60), which are relevant to this subject.

Examination of his Application for Attorney fees, [Clk. Tr. pp. 94-130] wherein Appellant sets forth his services rendered, which are in matters unrelated to the Manildis, amply demonstrates that the reasonable value thereof found by the Referee to be in the amount of \$12,500.00 is fully sustained. [Find. 19.] The lower court was not “required” to deny all fees, as it con-

cluded, and it is utterly unconscionable and an abuse of discretion on the basis of the fiction the trial court envisaged to deny compensation for the said unrelated services for which the petition was filed. Appellee's Brief, and the Findings and Conclusions of the Court do not and cannot point to a single thing done or omitted by Appellant which in any way was intended to, or did, adversely affect the Receiver. Note also that the Referee expressly stated: "I think, as far as I can see, Mr. Grodberg did conscientiously what he thought he should do. . .". [Rep. Tr., June 9, 1966, p. 41, lines 17-18.]

There is no question that appellant's representation of a guarantee creditor was known to the Referee, the Receiver, the attorney for the Creditors' Committee and special counsel for the Receiver, and that this was related in open court. [Rep. Tr., June 9, 1966, p. 35, line 24, to p. 36, line 7.] Nevertheless, the Receiver and the Referee sat back and suffered appellant to proceed to render the voluminous, weighty, difficult, and unrelated services which he did render for a period of years thereafter, without once raising any objections or even comment at all by them, or anyone else, to his continuing to represent the Receiver in said matters. Not until the hearings upon appellant's Application for Fees were held was the slightest intimation ever made by anyone at all that appellant allegedly had technically or otherwise represented an interest adverse to the Receiver. It is unthinkable that the debtor's estate should be so unjustly enriched and the appellant caused to suffer so drastic a forfeiture of fees for unrelated matters as results from the lower Court's decision herein.

It undoubtedly is true that a court cannot be estopped. Yet in considering whether there has been an abuse of discretion, equitable considerations must be weighed.

If the decision of the lower Court is permitted to stand, it will do more than work a gross inequity upon appellant individually. It will have the result of discouraging attorneys representing creditors from undertaking representation of a receiver or trustee, contrary to the intent of Congress to encourage the same through the amendments to Section 44 of the Bankruptcy Act and to the corresponding amendment to General Order 44 made shortly thereafter. The reason for this simply is that at any time even after the attorney has rendered services for a long period of time, anyone who regarded the attorney's actions as too forceful or felt otherwise unhappy would readily be enabled to cause all his compensation to be forfeited. For according to the lower Court's decision in this case, all such a person need do would be simply to assert, regardless of the validity thereof, a contention that a creditor's claim represented by that attorney was somehow subject to attack. The need for the Receiver to investigate the matter, which necessity theoretically would always have been present according to the thinking of Appellee's Brief and the lower Court's decision, would constitute "an actual, if not yet known" conflict of interest between the Receiver and that creditor, and this would "require" disallowance of all compensation to the attorney. The net result of this would be to close the windows of the bankruptcy court to the fresh air of active creditor participation through their respective counsel.

Conclusion.

It is respectfully submitted that it is both in the interests of justice and in the interests of advancing sound judicial administration that the Judgment of the District Court be reversed and that Appellant be allowed the reasonable value of his services as Attorney for the Receiver, found by the Referee to be in the sum of \$12,500.00.

Respectfully submitted,

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No. 22538

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the National
Labor Relations Board.

REPLY BRIEF OF PETITIONER.

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On Petition to Set Aside Order of the National
Labor Relations Board.

REPLY BRIEF OF PETITIONER.

I.

The Alleged Violation of Section 8(a)(5) of the Act.

A. The Absence of and the Board's Failure to Prove the Union's Majority.

This Brief will not discuss again the plethora of authority already covered in Petitioner's Opening Brief pertaining to the Union's alleged majority. The Board has, at best, attempted to ignore over a dozen Circuit Court cases by scarcely mentioning them in footnote; the Court, however, is again referred to those cases which, upon careful reading, will show, beyond doubt, their applicability to the facts in the instant case. Petitioner will, however, raise one very significant case that was published the day after the filing of its Opening Brief.

In *NLRB v. Southland Paint Company*, 394 F.2d 717 (5th Cir., May 8, 1968), Judge Wisdom, for a unanimous Court, discussed with precision and in detail many of the cases referred to and quoted in Petitioner's Opening Brief. In that case, it might be noted, the employer committed virtually every unfair labor practice in the book, including conducting wholesale surveillance on employees attending Union meetings, granting raises to employees to spy, establishing a grievance committee, threatening to close the plant and reduce wages, granting general wage increases and vacation benefits, interrogating employees, offering promotions to thwart the Union, discriminatorily demoting employees, improperly discharging three employees, suspending one and refusing to hire another. Nonetheless, the Court, while upholding the Board on all those counts, recognized that a totally different test is involved in viewing an 8(a)(5) refusal to bargain charge.

The Court reviewed the entire history of the so-called *Bernel Foam* and *Cumberland Shoe* doctrines, and in so doing quoted and echoed Judge Friendly's holding in *NLRB v. S. E. Nichols Company*, 380 F.2d 438 (2d Cir., 1967):

“But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, *especially to ordinary working people unversed in the ‘witty diversities’ of labor law*. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. . . .” (Emphasis in original.) (394 F.2d at 728-29.)

In the instant case, the Board, both in its decision and its brief, once again ignores the fact that Petitioner's employees were constantly told by Union officials and adherents and by literature that the cards had one purpose: the securing of an election. The Board totally ignores the fact that these employees, for the most part, were totally unsophisticated in labor law, the majority of them were of foreign background or recent arrivals in this country, and were clearly hoodwinked. Indeed, the Board completely ignored the specific testimony to this effect that is found in Petitioner's Opening Brief, pages 37-59, including the testimony of 19 specific employees who were individually deceived.

The Court in the *Southland Paint* case set forth in exact detail the nature of the misrepresentations made to the employees in that case by Union adherents (394 F.2d at 731, n. 19). The evidence pointed out there is indistinguishable from that in the instant case. Judge Wisdom, after pointing to that evidence, stated:

“We have reviewed the record with more than usual care. . . . [T]here is undisputed evidence that the solicitors told at least as many as a *dozen* employees that a purpose of the cards was to obtain an election. At least eight and perhaps more employees were permitted to sign under the impression that the cards were to be used to obtain an election. Except in one instance, the trial examiner did not discredit the signers’ testimony; he disregarded it.” (Emphasis in the original.)

The Trial Examiner and the Board in the instant case did the exact same thing.

The Court in *Southland Paint* again cited the *S. E. Nichols* case, *supra*, noting:

“. . . Judge Friendly noted that the cards, unlike those in *Engineers & Fabricators* (*but like the cards in the instant case*), [and in this instant case] did not contain an acceptance of union membership, ‘one thing an employee could readily understand’. Bearing in mind that ‘the function of authorization cards . . . is to demonstrate that a majority of the employees have ‘clearly manifested an intention to designate the Union as their bargaining representative’ (*Englewood Lumber Co.*) . . . there seems to be no reason why cards could not state in large type that if a majority signed, the union would claim representative status without an election’. 380 F.2d at 442. We agree.”

We submit that this Court should pick up the clarion call that cards, to have the efficacy the Board would give them, should contain language to the effect that the Union can claim representative status without an election. Indeed, we understand, unofficially, that the Board is contemplating the promulgation of such a rule.¹

In its Brief, the Board attempts to dismiss the clear significance of the Union's misleading and false circulars as to the purpose of the cards by stating that "nearly all the employees had signed the cards before the issuance of these circulars . . ." (Bd. Br. 38.) In the first place, these circulars merely *confirmed* what Union officials and adherents were telling the employees: the cards were simply to bring about an election. *Moreover*, the fact is, which the Board cannot deny, that the Union did not have a majority of signed cards prior to March 3 when the first known false circular was distributed. At least 12 employees signed their cards on or after that date. If these cards, therefore, are tainted with the fraud that is clearly made apparent by the circulars *alone*, then the Union's alleged majority disappears.²

The Board would make it appear that Petitioner seeks to overturn the Trial Examiner's resolution of

¹The Board's Associate General Counsel suggested the need for some reform when, after reviewing the law in this field, he stated that unions who desire to rely on cards as proof of their majority "would be well advised . . . in soliciting employees, not to make representations which might raise questions as to whether the signing employees freely and genuinely intended to designate the union as their collective bargaining representative." Gordon, "Union Authorization Cards and the Duty to Bargain", 33 Daily Labor Report, BNA, Feb. 15, 1968.

²See G.C. Ex. (authorization cards) Nos. 33, 40, 52, 56, 59, 65, 67, 68, 73, 74, 81 and 96.

conflicting testimony and that it is merely a question of credibility involved. (Bd. Br. 39-40.) In the final analysis, however, there is no avoiding the fact that the only basis of the Trial Examiner's finding discrediting the testimony of numerous employees as to their reason for signing cards was his own unique and extraordinarily unsophisticated position that "one who preferred not to have a union would probably prefer also not to have an election and would not sign a card." [R. 29.] This is the crux of his entire holding on this part of the case and it is a position that if it has ever been advanced by anyone, has been totally denounced by all specialists in the area and completely denied by all information available, including the AFL-CIO Guidebook for Union Organizers (1961).

Furthermore, the Board asserts that the Trial Examiner credited testimony of Sloane that he advised the employees that the cards would be presented to the company but that the company would in all probability turn them down and only then would there be an election. (Bd. Br. 3-4; 39; 41.) The references to the record by the Board for this statement not only show he made no such finding but, in point of fact, he found essentially the opposite.

"Vincent Sloane, the Union's representative in charge of the campaign, told the gathering, he testified, that the Union was attempting to obtain status as bargaining representative throughout the entire industry in Southern California, and that this would come about through elections conducted by the National Labor Relations Board." [R. 24-25.]

Moreover, the Board subsequently (Bd. Br. 41) names eight employees who were present at that meeting where Sloane allegedly made such statements and infers they heard such statements. Every one of those named employees, with the conceivable exception of one, essentially denied that Sloane made any such statement.³ Even if, against the great weight of evidence, the Trial Examiner had credited Sloane, it could be of no avail to the Board's position. In *Crawford Mfg. Co. v. NLRB*, 386 F.2d 367 (4th Cir., 1967), *cert. den.* 390 U.S. 1028 (1968), the Union agent made virtually the same statements that Sloane said he made but the Court there indicated that such assertions only cause confusion and do not support the Board's position. (*Id.* at 370-71.)

In an effort to undermine the testimony of 19 employees who stated or indicated that they signed cards for the purpose of having an election, the Board (Bd. Br. 40-41) adopts the extraordinary argument that because many of these employees voluntarily attended one or more Union meetings, they "obviously" were interested or in favor of the Union or at least more so than those that did not attend meetings. If this novel argument has any substance, they why bother with elections at all? Indeed, why bother with authorization cards? Why not just count people who go to Union organizational meetings? Patently, employees attend organizational meetings for a multitude of reasons. Curi-

³Cisneros [R.T. 585-586]; Cuda [R.T. 1504, line 18, to 1505, line 7]; Dellomes [R.T. 1356]; Garger [R.T. 1518, lines 2-5]; Kofink [R.T. 505, line 24, to 508, line 22]; Lawrence [R. T. 1479, line 16, to 1480, line 15; 1484]; Weymar [R.T. 518, line 29, to 519, line 5; 529, line 19, to 530, line 13; 531, lines 14-23]. See also Opening Brief, pp. 40-46.

osity, coercion, and, maybe, just a chance to get away from the house could be principal reasons.⁴

Finally, the Board's brief tries to deprecate the testimony of the many employees, witnesses both of the General Counsel and Petitioner, because, allegedly, their testimony was "induced." Neither the Board nor the Trial Examiner found, nor was there any charge, that the Petitioner's actions in preparing for trial were in any way improper. Even more importantly, however, is the fact that the Board found it necessary to torture the record even to make such an assertion. Not only do the transcript references cited by the Board fail to support its assertion [Bd. Br. 45; R.T. 367-370; 532-536; 639-642], but, quite the contrary, they show that these employees voluntarily and genuinely sought to place the true facts before their employer. Contrary to the implication in the Board's Brief, these employees never changed their minds; they simply sought to prevent a *tour de force* by the Union which they considered to be not only totally unjustified but fraudulent.⁵

⁴The Board also argues that none of the employees asked the Union or its solicitors for the return of their cards after the recognition request. (Bd. Br. 41.) Clearly, even if they knew of the request, why should they have asked for the return of their cards? The Union said it was going to have an election and an election was had. But it was only after the Union lost the election, for the first time, did it advise the employees that it would seek recognition nonetheless. The employees were never told that the Union could do this beforehand. And after the election, the majority of the employees ruefully learned that it was too late to ask for their cards back.

⁵In addition, the Board takes issue with Petitioner's arguments that three particular authorization cards could not be used for determining a majority. (Bd. Br. 33-34.) The Court is respectfully directed to a very recent case, in addition to those cited in the Opening Brief on this point, *NLRB v. Texas Electric Cooperatives Inc.*, F.2d (5th Cir., Aug. 5, 1968). Nei-

(This footnote is continued on the next page)

B. Petitioner's Refusal to Bargain Was Bottomed Entirely Upon a Good Faith Doubt as to the Union's Majority.

After this Reply Brief had been set in galley this Court's decision in *NLRB v. Sonora Sundry Sales, Inc.*, F.2d (9th Cir., Aug. 2, 1968) was published by the services. This Court in that case, it is submitted, strongly supported this Petitioner's position that when an employer has reason to believe that employees signed authorization cards intending only to express a wish for an election and a union engages in misrepresentations in order to procure such cards, there is a sufficient basis for a good faith doubt, justifying the refusal to recognize the union. In the instant case the Petitioner had solid reason for doubting the union's alleged majority, as indicated in detail in Petitioner's Opening Brief and in Appendix C thereof, and the union's misrepresentations were manifest.

The Trial Examiner and Board found a lack of good faith doubt solely on the alleged 8(a)(1) and 8(a)(2) violations. [C.T. 30.]⁶ Most of the alleged 8(a)(1) violations, as will be shown below and as has been shown in the Opening Brief, can hardly be sustained and

ther the Board nor Trial Examiner made any finding whatsoever that these particular cards were properly authenticated. Petitioner finds it unnecessary to add anything further to what it has said on this matter (Opening Br. 10-11, n. 6), except to answer that Meier, one of the individuals whose card is in question, was the same employee who was the first to advise Petitioner of the Union's organizational drive; he further told the company's president that he did not want to see the Union in the shop. Meier also told him to call him at his home, but the latter did not do so. [R.T. 757-758; 910-911.]

⁶The findings of violations of Section 8(a)(3) do not enter into the good faith doubt position as the Trial Examiner at no time relied upon them in finding an 8(a)(5) violation. Of course, one of the terminations occurred two weeks after the election.

are, at best, tenuous. Yet the Board in its Brief, as it is prone to do in almost all of these cases, paints the blackest picture possible of the Employer's actions in an effort to have a circuit court rubber-stamp the draconian remedy it proposes.

Recent circuit court cases have shown, beyond doubt, that even in situations where employers have committed wholesale and serious unfair labor practices, this may not, by itself, meet the burden imposed upon the General Counsel to establish a lack of good faith doubt. The Sixth Circuit was confronted with this question in *NLRB v. Fashion Fair, Inc.*, F.2d (6th Cir. July 30, 1968). There, a unanimous Court upheld the Board's conclusions that the employer had violated Section 8(a)(1) and 8(a)(3) by threatening employees with discharge for engaging in organizational activity, by interrogating them as to organizational activity, and by promising them benefits if they refrained from giving support to the Union. The Court further upheld the Board's finding that the company had discharged the Union's most active supporter for his Union activities and had improperly granted sick leave benefits. Nonetheless, the Court held the General Counsel had not satisfied his burden of proving bad faith by the Employer. Citing many of the cases discussed in Petitioner's Opening Brief, the Court held that while the Employer's conduct may warrant setting aside the election, knowledge of a Union's unsuccessful past attempts to gain recognition by an election was, alone, adequate grounds for a good faith doubt. In the instant case, Petitioner had knowledge of the voluntary statements of the majority of its employees at the time of the demand that they did not want Union represen-

tation; Petitioner had proof positive of the Union's misrepresentations that the authorization cards were being solicited solely to obtain an election.

In a previous Sixth Circuit case, *Pulley v. NLRB*, F.2d (June 5, 1968), 11 employees were individually interrogated as to their Union membership and activity and were asked to report the names of other employees engaged in Union activity; the employer created the impression that it was keeping Union meetings or attendance under surveillance. Once again, though the Court upheld the Board's unfair labor practice findings, the Court held the General Counsel had failed to meet his burden of proof that the employer acted in bad faith. The Court noted that of the 11 employees who were the objects of the employer's unfair labor practices, 9 of them were strongly committed to the Union and that, therefore, it appeared that the illegal activities had little, if any, effect upon the freedom of choice guaranteed by the Act nor did this activity prevent other employees from signing cards. In the instant case, virtually every finding of interrogation and threats by Petitioner concerned strong Union adherents who clearly were not affected. The Court in *Pulley* further found no evidence that the employer's conduct dissipated the Union majority. Such is the case here; there is completely absent from the Trial Examiner's decision any *finding* that the alleged unfair labor practices dissipated the alleged Union majority. Board law requires that to negate an employer's good faith doubt, it must be found that the unfair labor practices were *in fact* responsible for the loss of Union majority. *McQuay-Norris Mfg. Co.*, 157 NLRB 131 (1966).

The Fourth Circuit has recently joined the majority of circuits in rejecting the Board's position on this point. In *Benson Veneer Co. v. NLRB*, F.2d (4th Cir., July 8, 1968), the Court upheld the Board's finding that the employer violated Section 8(a)(3) by discharging six Union supporters in an effort to discourage Union activity, coercively interrogated employees, engaged in surveillance, threatened employees that the company would close the plant and that other serious harm would befall them. Nonetheless, again the Court stated that notwithstanding such activity, "we do not see the logic in branding the employer's queries as in bad faith just because it loses its balance and oversteps the line," citing *S. S. Logan Packing Co.*, 386 F.2d 562 (4th Cir., 1967) and *NLRB v. Dan River Mills*, 274 F.2d 381, 388-89 (5th Cir. 1960.)⁷

Respondent supports its position and relies heavily upon this Court's decision in *NLRB v. Luisi Truck Lines*, 384 F.2d 842 (9th Cir., 1967). That case is clearly inapposite, however. The alleged good faith doubt of the employer there was bottomed *entirely* upon the employer's erroneous doubt of the appropriateness of the requested unit. The Board has repeatedly held that such a doubt, even if held in good faith, is no defense to a refusal to bargain charge. *Benson Wholesale Co., Inc.*, 164 NLRB No. 75 (1967); *Tonkin Corp. of Calif.*, 165 NLRB No. 61 (1967), *aff'd*, *Tonkin Corp. v. NLRB*, 392 F.2d 141 (9th Cir., 1968). A very recent

⁷On June 28, 1968, the Fourth Circuit, in a number of cases involving wholesale unfair labor practices on the part of employers, nonetheless found that a good faith doubt could still be had by the employer and rejected the Board's 8(a)(5) findings. See *General Steel Products v. NLRB*, F.2d; *NLRB v. Gissel Packing Co., Inc.*, F.2d; *NLRB v. Heck's, Inc.*, F.2d, all decided June 28, 1968.

Circuit Court decision in *NLRB v. Bardahl Oil Co.*, F.2d (8th Cir., Aug. 9, 1968) recognized that even a good faith misunderstanding of an appropriate unit does not justify a refusal to bargain; the Court, however, emphasized that a good faith doubt based upon whether the union represents a majority in the claimed unit is another matter. The distinction is justified in that a good faith doubt based upon majority lessens the dangers that a union will be forced upon a nonconsenting majority; the same danger does not attach where the majority status of the union is conceded and only the question of the appropriate unit is involved. In the instant case, Petitioner's good faith doubt was bottomed entirely upon significant evidence that the Union did not have a true majority in the unit sought by the Union. A good faith doubt on these grounds will excuse an employer's failure to recognize a union. See *NLRB v. Security Plating Co.*, 356 F.2d 725, 727 (9th Cir., 1966); *NLRB v. Hyde*, 339 F.2d 568, 570 n. 1 (9th Cir., 1964). And concomitant unfair labor practices of the types involved in this case do not negate the evidence upon which the good faith doubt came about.

The Trial Examiner did not discredit the tremendous amount of evidence supporting Petitioner's good faith doubt; he simply ignored it. Yet there can be no question, to begin with, that the Employer's Exhibits 4, 5 and 6 *clearly* gave more than adequate reason to believe that the Union was deceiving the employees. Certainly, a good faith doubt on this alone must be sustained; the Board totally ignores this.

The Board indicates that the factual basis for the determination of a good faith doubt by Fink and

Howland is suspect and cannot be given weight. (Bd. Br. 49.) Yet, their conclusions were fully supported by the testimony of virtually every single witness in this case. The Board would have us ignore virtually all the testimony supporting Employer's Exhibit 7. There is absolutely no justification for this type of decision making.⁸ The Board totally ignores the fact that the employees' statements, as indicated by the numerous citations to the record in Appendix B to the Opening Brief, were made voluntarily and freely, and it simply brushes off the testimony concerning each of the employees (Appendix C) showing beyond question that Petitioner was totally justified in believing a majority of its employees opposed the Union.⁹

Finally, the Board holds that Fink and Howland had no evidence at the time of their discussion that the Union was over-reaching in obtaining cards and that Attorney Gould was given no information as to the majority status question when he advised his client. Such an assertion is patently contrary to the record. [R.T.

⁸The Board states that the company admitted it had no knowledge concerning the circumstances under which the Union's cards "may have been obtained." (Bd. Br. 46-47; 49.) This is a totally unjustified twisting of the record. Petitioner in its rejection of the Union's demand stated unequivocally that it did not believe that its employees had authorized the Union to represent them "freely, voluntarily and without coercion." It added it had no knowledge of the "authenticity" of the cards or how they may have been obtained. Surely, Petitioner could not vouch as to whether cards had been forged, but it knew that the Union had misled the employees and this goes to the question of the cards' "validity." (G.C. 39.)

⁹The Board urges that the assessment of Union strength by Petitioner was the result of illegal questioning of employees. The Trial Examiner made no such finding and such an assertion (Bd. Br. 50) is completely negated by the evidence. See Appendices B and C attached to Opening Brief. See also *Benson Veneer Co. v. NLRB*, F.2d (4th Cir., 1968).

791, line 12, to 794, line 14; 886, line 16, to 888, line 18; 929, line 24, to 934, line 5; 950, line 9, to 959, line 12; 994, line 19, to 999, line 4, 1174, line 1, to 1175, line 19.]¹⁰

II.

The Section 8(a)(1) Finding With Respect to the Wage Increase Is Premised on Mere Conjecture Rather Than Substantial Evidence; the Further Findings Based Upon Questioning and Alleged Threats Are the Product of an Erroneous Interpretation of the Law.

A. The Wage Increase.

Petitioner voices no disagreement with *NLRB v. Exchange Parts Co.*, 375 U.S. 405, cited by the Board (Bd. Br. 14-15), holding that the conferring of economic benefits by an employer with the express purpose of discouraging union activity violates Section 8(a)(1) of the Act. But *Exchange Parts* merely states the legal result which flows from given facts (there the employer *admittedly* granted benefits to influence employee choice). The case affords no guidance at all for the decision as to whether or not any particular change has been improperly motivated.

¹⁰In *NLRB v. Ben Duthler, Inc.*, _____ F.2d _____ (6th Cir., May 2, 1968), the Court noted that an attorney had advised the employer in an effort to determine the Union's representative status and that the Trial Examiner had refused to consider this evidence.

"Such reasoning ignores the only purpose Mr. Duthler's consultation with his attorney might serve: to benefit from the attorney's knowledge of the situation and his experience and expertise in labor matters. Whatever knowledge and experience his attorney had must be attributed to Mr. Duthler, who acted in accordance with his attorney's advice."

Other authorities relied upon by the Board are equally inappropriate. For example, *Betts Baking Company v. NLRB*, 380 F.2d 199 (10th Cir., 1967), involved *direct evidence* of unlawful employer intent. No such evidence exists here. Similarly, this Court in *NLRB v. Laars Engineers*, 332 F.2d 664 (9th Cir., 1964), furnished no support for the Board's position. Indeed, if anything, that case operates in Petitioner's favor. There the Court founded its decision on the fact that the employer had departed in significant respects from his past practice in granting wage increases. No such evidence of departure exists here. The uncontradicted evidence is that Petitioner's wage increase was in total accord with its prior practice. [R.T. 938-942; R. Empl. Ex. 10.] See *Advance Envelope Mfg. Co.*, 170 NLRB No. 166 (1968). The Board's statement (Bd. Br. 16) that Petitioner expanded the coverage of the proposed raises beyond those employees covered in the survey misses the mark if it is an attempt to stigmatize that action. Approximately 20 top rate increases resulted from the survey. [R.T. 897; 1148.] At the same time, as Petitioner had always done, employees not at the top rate were considered for general merit increases. The increases which followed [45 or 50 out of 115 shop employees; R.T. 1149] were less in number and percentage than prior years where as many as 80 merit increases were given. [R.T. 1148-1149.]¹¹

The Board's crucial error is in having disregarded overwhelming evidence of unlawful motivation in favor of raw conjecture—*i.e.*, that the increase was unlawful because of a mere coincidence in time with beginning

¹¹At one time in the recent past, practically everyone in the shop had received a merit increase. [R.T. 1151.]

union activity. Timing is a proper factor to consider, but it is rarely, if ever, that an 8(a)(1) finding is hinged on that factor *standing alone*. And even this flimsy ground does not withstand scrutiny. The Board has conceded that the wage survey was first discussed in December 1964, well prior to the advent of any union activity at Petitioner's plant. [C.T. 24.] The survey was completed and top rate increases decided upon in mid-February, 1965 [R.T. 840-841; R.Ex. 18; C.T. 24] when there was still no notice of Union activity. First knowledge of Union organizational efforts came to Petitioner via an anonymous phone call on February 22, 1965 [R.T. 765-766; 909-910] and the first industry-wide Union meeting was not held until February 28, more than a week after the final decision on increases had been made.

Admittedly, on March 8, 1965, when the increases first appeared on employee paychecks, the company was aware of some Union activity. But this knowledge did not oblige it to withhold an otherwise lawfully conferred raise especially when there had as yet been no demand for recognition, and no petition for an election. While the absence of a Union demand or petition does not guarantee proper motivation, it is certainly entitled to great weight. And when this factor is supplemented by abundant evidence of economic necessity and accord with past policy, as here, there can be no other conclusion than that the Board's finding lacks the support of substantial evidence and, therefore, must be reversed. *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951).

B. Questioning of Employees.

The Board falls into serious error when it contends (Bd. Br. 16-18) that the incidents of questioning adverted to by the Trial Examiner, standing independently, constituted violations of Section 8(a)(1). This flatly contradicts the Trial Examiner's own finding, adopted in its entirety by the Board, that such incidents were rendered coercive, and, therefore, unlawful, *not because of any inherent threat in the conversations themselves*, but rather because the incidents occurred against a background of allegedly improper statements that a Union might force Petitioner out of business.

The Trial Examiner could not have been more explicit on this point:

"I find in late February and in March the Respondent [Petitioner] questioned some of its employees concerning their interest in the Union *and that because some of this questioning was in a context of threats that a union might force the Respondent out of business it constituted interference, restraint, and coercion of employees in violation of Section 8(a)(1) of the Act.*" [C.T. 32, lines 19-23.] (Emphasis supplied.)¹²

Clearly, by utilizing the so-called surrounding "context of threats" to support a Section 8(a)(1) violation, the Trial Examiner has conceded that the specific epi-

¹²The Trial Examiner's Conclusions of Law again demonstrated his position: "By threatening the close of business in the event of Union victory in the representation election and by questioning employees concerning their union preferences *in the context of coercion* the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act." [C.T. 38, lines 36-49.] (Emphasis supplied.)

sodes of questioning considered alone were not sufficient to justify an unfair labor practice finding. To the extent, therefore, that the Board now urges the independent significance of this questioning, it distorts the record by contending upon a ground for which neither the Trial Examiner nor the Board ever held.

Indeed, the Board's decision on this point can only be construed as implicit agreement with Petitioner's contention that the conversations contained no promise of benefit or threat of reprisal and were, thus, an exercise of free speech protected by Section 8(c) of the Act. *Don the Beachcomber v. NLRB*, 390 F.2d 344 (9th Cir., 1968); *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir., 1964).

C. Alleged "Threats" of Plant Closure.

We reemphasize a point made in the Opening Brief—if the "threats" of plant closure were in fact legitimate campaign predictions, protected by the Act, then Petitioner's conversations with employees are automatically vindicated as well because the background "context of threats", expressly and exclusively relied upon by the Board to find these conversations unlawful, will have disappeared.

This Court need go no further than its own recent decision in *NLRB v. TRW-Semiconductors, Inc.*, 385 F.2d 753 (9th Cir., 1967), to conclude that the Petitioner's campaign speeches and literature fell well within permissible limits. Despite the Board's futile at-

tempts to distinguish it, the case remains squarely on point and fully answers each of the contentions raised in the Board's brief. For example, it is argued that Weitzel's speech of March 9, wherein he stated that the Company "could" (not *would*) go out of business because of the Union was a veiled threat to shut down if the Union prevailed. But one isolated sentence in one speech is no testing ground. The material must be viewed in its entirety. On two separate subsequent occasions, Petitioner made it crystal clear that it would never, on its own, discontinue operations.¹³

The literature cited by the Board as "threatening" contained nothing more than predications of what the *Union* might do or cause—unsound demands and potential strikes with their resultant effect on scheduling and inconvenience to customers were typical examples. [G.C. Ex. 9; 15; C.T. 28, lines 10-28.] This Court's holding in *TRW-Semiconductors, Inc., supra*, is dispositive of the question: "There is no suggestion that the employer will reduce benefits or cut jobs if the employees vote for the union. *The prediction is that the union may or will cause such losses through strikes. There is also a prediction that the union's presence may or will cause loss of customers, to the possible or even probable detriment of employees. Such arguments, too are protected by Section 8(c).*"

¹³See Weitzel's June 10 speech [G.C. Ex. 19, p. 27], and Fink's June 8 letter [G.C. Ex. 17] quoted at page 87 of the Opening Brief.

The Board further argues (Bd. Br. 21-22) that the Mars-Falco-Alba theme was coercive because the Company's statements that these tool and die shops had closed on account of union problems had no factual or legal basis. Of course, with respect to Falco, Petitioner had every reasonable basis for such a contention: Falco's former president, Skulsky, had written Petitioner a letter to that effect. [C.T. 28, lines 10-28.] Moreover, the Union had sufficient opportunity to rebut these claims, if it could have done so, but made no response. Petitioner contends that everything about Falco-Mars-Alba was factually correct, but no different result is dictated if this were not the case. Again, *TRW-Semiconductors, Inc.* hits the mark:

"Section 8(c) does not protect only those views that are correct, *nor does it forbid them because they are demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order.*" (Emphasis supplied.)

Finally, in typical fashion, the Board refers to Petitioner's "other coercive conduct," totally unspecified, as support for its determination to "discount subtle attempts to shift responsibility" for plant closure to the Union. (Bd. Br. 23.) This bit of administrative sophistry is accomplished without benefit of a single record citation and despite clear evidence that the Employer's statements were exactly what they purported to be: lawful predictions as to events over which it would have no control. See *Southwire Co. v. NLRB*, 383 F.2d 235 (5th Cir., 1967); *NLRB v. Morris Fishman & Sons, Inc.*, 278 F.2d 792 (3rd Cir., 1960); *NLRB v. Wilson Lumber Co.*, 355 F.2d 426 (8th Cir., 1966); *NLRB v. Uniform Rental Service Inc.*, F. 2d (6th Cir., 1968).

III.

The Grievance Committee (Sec. 8(a)(2)).

Demonstrating an inclination to place great emphasis on the trivial, the Board persists in citing to the Grievance Committee as an illustration of employer misconduct. Petitioner acknowledges that it suggested revival of the Committee to discuss topics of mutual concern on March 9, 1965, some two weeks *prior* to the filing of the Union's representation petition and at a time when, to Petitioner's knowledge, Union activity was minimal.

A wide range of subjects was discussed during several subsequent meetings of the Committee and the company carefully pointed out that it was legally prevented from, and would not, make promises with respect to any item under discussion. [C.T. 26, lines 43-49.] With the prescience that stems from hindsight, the Trial Examiner and Board have seized upon these innocuous meetings, inflated the importance of the subjects discussed all out of proportion [*e.g.*, company agreement to pay for indicator points which cost \$1.50, Bd. Br. p. 7; Tr. 825-827] and attempted to make a major issue out of a violation which, if it is such at all, remains highly technical at best.

IV.

**The Terminations of Cantrell and Klein
(Section 8(a)(3)).**

A. The company's explanation of Cantrell's termination "fails to withstand scrutiny" (Bd. Br. 27) only if all of the relevant evidence on the point is ignored, as the Board has done. To illustrate, the Board contends that there really was no reduction in Cantrell's work, entirely disregarding uncontradicted testimony that he was the only night milling machine operator in the plant at a time when a significant reduction in milling machine work occurred. [R.T. 1025-1026; 1646-1651; 1107; 1098-1100.] Since his layoff, no one has ever been hired as a replacement on the job he performed. [R.T. 1697; 1108.] Moreover, Cantrell was not offered a job on the jig-bore because management was never aware that he had any experience on the machine, if indeed he did.¹⁴ Further, he had unequivocally refused a jig-bore trainee job twice before. [R.T. 1101-1102; 1640-1641; 1693.] In these circumstances, the Company understandably gave no consideration to Cantrell, especially as it required an *experienced* man. There is no objective evidence supporting the Board's inference of discrimination, aside from possible knowledge that he was a Union adherent. This, of course, does not operate to prevent a discharge for proper cause. *Lawson Milk Co. v. NLRB*, 317 F.2d 756, 760 (6th Cir., 1963); *Crawford Manufacturing Co. v. NLRB*, *supra*.

¹⁴Cantrell claimed he told Fink that he had jig-bore experience and wanted the job. Management officials denied this, stating that Cantrell had never relayed such information. The only *objective* evidence, Cantrell's application for employment, stated nothing about prior jig-bore experience. [R.T. 1044-1045; R. Ex. 11.]

B. Klein was not terminated until two weeks *after* the election which Petitioner had won by a substantial margin. [C.T. 34, lines 39-40.] Klein was terminated because, as the Trial Examiner found, "Klein's profit and loss statement [between March and mid-June 1965] shows an almost unbroken string of losses ranging from \$179 to \$839." [C.T. 36, lines 54-55; R. Ex. 18; R.T. 1266, lines 3-6; R. Ex. 17.] Considering the record as a whole, the Board's finding is not supported by substantial evidence.

When there is no direct evidence of discrimination, as here, the Board traditionally invokes its so-called "expertise" in labor matters as a sufficient basis for its determination. Thus, the Board's statement, unaided by evidence, that the Company's explanation for Klein's discharge does not "ring true." (Bd. Br. 29.) But the cases are clear that the burden of proof is on the General Counsel to show that some part of the company's motivation was discriminatory. *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir., 1967). This burden is not sustained by a Board view, unsupported by substantial evidence, that the discharge was for insufficient cause. *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848, 854 (5th Cir., 1954); *NLRB v. Wagner Iron Works*, 220 F.2d 126, 133 (7th Cir., 1955).

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IN THE
UNITED STATES COURT OF APPEALS
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MECHANICAL SPECIALTIES, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION TO REVIEW AND SET ASIDE AND ON
CROSS-PETITION TO ENFORCE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,538
MECHANICAL SPECIALTIES, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION TO REVIEW AND SET ASIDE AND ON
CROSS-PETITION TO ENFORCE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED

1. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(1) of the Act by granting wage increases to discourage union support; interrogating employees as to union activities; and threatening employees with plant closure and loss of jobs if they selected the Union.

2. Whether substantial evidence on the whole record supports the Board's finding that the Company dominated and interfered with the employees' grievance committee in violation of Section 8(a)(2) and (1) of the Act.

3. Whether substantial evidence on the whole record supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Alfred Cantrell and Irving Klein for their union activities.

4. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union which represented a majority of its employees in an appropriate unit.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Mechanical Specialties, Inc. (hereafter, the Company) to review, and on cross-petition of the National Labor Relations Board to enforce, an order of the Board issued on June 28, 1967, against the Company, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*). The Board's Decision and Order (R. 23-42, 66-69)¹ is reported at 166 NLRB No. 31. This Court has jurisdiction under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Los Angeles, California, within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company threatened and coerced employees in violation of Section 8(a)(1) of the Act by granting wage increases to combat union organization, interrogating employees about their

¹References to the pleadings, Decision and Order of the Board, the Trial Examiner's recommended Decision and Order and other papers reproduced as Volume I, Pleadings, are designated "R". References to portions of the stenographic transcript reproduced pursuant to the Rules of the Court are designated "Tr." "GCX" refers to the General Counsel's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

union sympathies, and threatening plant closure and loss of jobs if the employees selected the Union.² The Board further found that the Company violated Section 8(a)(2) and (1) of the Act by dominating and interfering with an employee grievance committee, a labor organization within the meaning of the Act. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Alfred Cantrell and Irving Klein to discourage union activity. Finally, the Board found that the Company refused to bargain with the Union, which represented a majority of the employees, in violation of Section 8(a)(5) and (1) of the Act. The evidence on which these findings rest is summarized below.

A. The Union campaign

In the fall of 1964, the Union began a campaign to organize employees of tool and die shops throughout Southern California (R. 24; Tr. 698). The Company, which fabricates tools and other items in its Los Angeles plant (R. 24, 7, 16), became aware of this general campaign in December of 1964 (R. 24; Tr. 753-754).

On February 28, 1965, the Union held a meeting for employees from a number of tool and die shops in the area, including the Company (R. 24; Tr. 693-694, 697-698). Vincent Sloane, the Union representative in charge of the campaign, spoke to the employees (R. 24; Tr. 694). Cards authorizing the Union to bargain collectively on behalf of the signers and explanatory material were distributed (Tr. 698-700, GCX 37). Sloane explained that the purpose of the cards "in the first instance was to obtain

²International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

representation by the UAW for the employees in the plant” (Tr. 694-695). He also advised those present of the procedure leading to recognition and read from a form letter sent by the Union to another employer requesting recognition on the basis of a card majority (Tr. 695, GCX 36). However, he explained that recognition would probably come about through a Board election (R. 25) because, as he stated, in his experience, employers normally did not recognize unions on the basis of cards and “in all probability we would have to go the route of an election” (Tr. 697).³

B. The Company interrogates employees and grants wage increases to combat the Union; the Company president also tells assembled employees that the Company could close because of the Union and suggests the formation of a grievance committee which is immediately formed and dominated by the Company

The Company first learned that the Union was seeking to organize its employees on about February 22, 1965, (Tr. 1154-1155, 755-756). At this time, Vice-President and General Manager Michael Fink told Plant Superintendent Robert Howland about the organizational activity and asked him to “look into it and report back” (R. 32; Tr. 751, 756, 915-918). Howland, in turn, called a meeting of his leadmen and foremen in late February and instructed them to “keep their eyes and ears open” for union talk and to report information back to him (R. 32; Tr. 1536-1538, 1583, 1592, 1619, 1628, 1611). These foremen and leadmen sought out and obtained information from employees about their union sympathies and reported this to Howland (R. 32; Tr. 1525-1526, 1535, 1554, 1564, 1568-1569, 1586, 1597, 1604-1607, 1624, 1668, 1673).

³The Company offered some testimony that Sloane said the cards would be used solely for an election. The Examiner discredited this version of Sloane’s remarks and thus credited Sloane’s testimony (R. 24-25, 29).

Howland himself questioned employees about the Union (R. 32; Tr. 527-528, 557-558, 128-129, 1139, 278, 1229-1230, 1428-1429). He approached employee Jackie Virgil, stating that he “heard [that Virgil] had signed a card”. Virgil did not reply (Tr. 384-387). On one occasion after a union meeting in mid-March, he questioned employee Anders Ahlstrom about the meeting and asked what the Union had promised him (Tr. 393). Howland also stated that the Union could not get more money for him, that “there would be benefits” and if the union came into the plant he would have to pay dues and it would “cut down the hours” (Tr. 393). Also at this time, Howland asked employee Irving Klein what the Union could do for the Company. After Klein answered, Howland said that the Company could either bargain with the Union, fight the Union or “go out of business” (R. 31; Tr. 275). On another occasion Howland asked employee Thomas Booze what he thought of the Union (Tr. 1430-1431).

Fink also spoke with many employees about the Union (R. 32; Tr. 1394, 886-887, 993-994). In early March, 1965, shortly after the first union meeting, Fink approached employee Al Cantrell and stated, “I understand that there is a Union campaign going on” (R. 31; Tr. 121-122). When Cantrell replied there was, Fink stated, “I would like a little kickback on it Is there anything you could tell me about the [union] meeting, or about the campaign?” Cantrell told him that the Union wanted to “see if we want to have a Union or be represented by UAW-CIO.” (R. 31; Tr. 122). Fink also asked Cantrell to give him the names of other employees who attended the union meeting, but Cantrell refused (R. 31; Tr. 122).

In the course of Howland’s conversations about the Union with employees, he questioned them about conditions in the shop (Tr. 1229-

1232). They complained about low wages (Tr. 1231-1232). At the beginning of March, the Company decided to give raises to its employees (Tr. 79-81). At this time Company officials were aware of the union activity at the shop (Tr. 83-84). The Company announced and put into effect raises for some 65 employees in all classifications on March 8, 1965 (R. 24; Tr. 898, 1146-1150, GCX 106, 107).

On March 9, 1965, President Weitzel spoke to assembled employees on work time. He stated that he had heard rumors of union talk and dissatisfaction (R. 25; Tr. 33, 36, 279-280). He explained that there was no need for a union, that organized shops in San Francisco were barely existing and that a union could drive the Company out of business (R. 25; Tr. 37, 280). He also stated that he felt the Company and the employees could solve their problems "among themselves" (R. 25; Tr. 36, 279-280). He then suggested the formation of a grievance committee (R. 25; Tr. 36, 280). Representatives for the committee were selected by the employees and later that day during working time they met with representatives of management (R. 25; Tr. 37-38, 342). A number of topics were discussed at the meeting, including increased insurance coverage, vacations, bonus and holiday pay (R. 26; 40-41, GCX 3). That evening Foreman Walter Payton, an admitted supervisor (Tr. 718), chaired a meeting at which 2 employees were elected to the grievance committee to represent the night-shift employees (R. 25 n. 1; Tr. 338-341). On March 13, President Weitzel wrote letters to all employees advising them that he was looking into a better hospitalization plan as a result of the meeting (GCX 10).

Other Grievance Committee-management meetings were held on March 16, April 5 and May 21, 1965 (R. 26; GCX 3, 4, 5, 7, Tr. 39-47, 342-343).

Minutes of prior meetings were prepared by the Company and read and distributed to employee representatives at the following meeting (Tr. 40-46, 343, 354-355, 819). Discussions continued on insurance coverage and vacation pay as well as other matters such as hours of work, sick and overtime pay, and job classifications (R. 26; Tr. 345, 346, 351-353). At one meeting employee representatives brought up the proposal that the Company repair or replace measuring indicator points which machinists had to provide themselves; the Company agreed to provide and pay for the indicator points in the future (R. 26; Tr. 347-349, 359-360, 1134-1135, 825). On another occasion the Company supplied a larger grinding wheel which the Committee representatives had requested (R. 26; Tr. 350, 1135). On April 7, 1965, the Company distributed to all employees a report signed by President Weitzel, of matters discussed at the April 5 management-Grievance Committee meetings (R. 26; GCX 6, Tr. 45). In the report, the Company stated that it recognized that changes in the group insurance policy "are necessary" but because of "labor law regulation while the labor board proceedings are pending," the Company would not "give any increased benefits." The report continued, "this same problem prevents improved benefits regarding holidays, vacation pay and other items discussed with your representatives," and promised that the Company would continue to have "increased wages and benefits" (R. 26; GCX 6).

The Grievance Committee has no by-laws, rules or constitution. It collected no dues and held no meetings on its own or with other employees; it met with management only on working time. Vice-President Michael Fink selected the time and place of the meetings (R. 32; Tr. 354, 341; Tr. 38, 47-48, 342). Management officials then notified the employee representatives of the time of the next meeting (R. 32; Tr. 48, 342-343, 344).

After the May 21 meeting, which was held some three weeks prior to the election, no further meetings were apparently ever held.

C. The Union is authorized as bargaining representative by a majority of the employees and seeks to obtain recognition. The Company refuses.

Between Sunday February 28, the day of the first union meeting, and Wednesday, March 3, 1965 a majority of the 114 or 115 employees concededly in an appropriate unit (See Co. Br. 9) signed authorization cards (GCX 25, 28-100).⁴ By March 12, 1965 the Union had received 68 of these cards (Tr. 700-703). On that day the Union sent a letter to the Company stating that a majority of its production and maintenance employees had selected the Union as their bargaining agent. The Union also offered to prove its majority status by submitting the cards to an impartial third party and stated a desire to begin negotiations towards a collective bargaining agreement (R. 25; Tr. 703-704, GCX 38).

On Sunday, March 14, the Union held a second meeting with employees at the Union Hall. About 45 of the Company's employees attended (Chg. Party Exh. # 2, Tr. 1745). Howard Berno, an employee who was later

⁴The Authorization cards read, in relevant part, as follows:

MAIL THIS CARD TODAY
AUTHORIZATION TO UAW

Date _____, 19____

I _____ authorize UAW to represent me in collective
 (print name) bargaining

[space for address and
job information]

signature

The reverse of the card, with postage paid, had the Union's name and the address of its Los Angeles headquarters.

appointed Personnel Manager, a supervisory position, attended this meeting (R. 25; Tr. 333). The next morning, he reported to Vice-President Fink about the meeting and also informed him that Union Representative Sloane told those in attendance that he had sent a letter to the Company (Tr. 1725-1726, 1777-1778).

On March 19, 1965, the Company responded to the Union's request for recognition by letter, stating that it had a "good faith doubt" as to the Union's majority. The letter continued, "We do not believe that our employees have authorized your organization to represent them, freely, voluntarily, and without coercion. We further have no knowledge of the authenticity of any authorization cards that you claim to have, or the circumstances under which they may have been obtained. For these reasons we must decline to recognize you as the bargaining representative of any of our employees" (R. 26-27; GCX 39).

D. The Union files an election petition; the Company unlawfully interferes with the election

On March 22, 1965, the Union filed a petition for an election. (R. 27; GCX 1(a)). A hearing was held and on May 18, 1965, the Regional Director ordered an election to be held in an appropriate unit (R. 27; GCX 1(b)(c)).

In leaflets and letters sent or distributed to individual employees, the Company urged the employees to reject the Union. In one communication the Company stated that a union contract "is no better than the ability of the company to continue to remain in business. Look at what happened to Falco Tool and Die. It had a contract with this Union but where is it now?" (R. 27; GCX 9, Q&A # 25). On May 12, Vice-President Fink elaborated in a letter to all employees, stating:

If you have not heard or are a newcomer to the trade, Falco, Mars and Alba Engineering were large and successful job shops in the area and some years back their employees were promised the Pie-in-the-Sky and went union. As the story goes, the Pie-in-the-Sky hit the sky blue yonder. Alba Engineering lasted six months; Mars and Falco did not last much longer when they too hit the blue because these shops could no longer operate with the shop stewards or the boys from Detroit. (R. 27; GCX 14, Tr. 56).

The Company also sent other letters to employees. One from its regional sales manager, stated that customers were "concerned about the consequences" should the Union succeed and whether the Company could compete (R. 27; GCX 15). Another letter, solicited by President Weitzel, bore the signature of the former president of Falco Machine and Tool Company. The letter stated that his company was prospering when "a union was introduced into our plant." The letter also praised the Company's management and stated, "the employees of Falco chose a union and found themselves heading down the road to self-destruction." (R. 28; GCX 20).

On June 8, 1965, Fink again wrote to employees. He emphasized that the Company "did not have to give a thing" the Union asked for and that a strike would follow if the Union's demands were rejected. Urging employees to disbelieve Union claims that a strike would not occur, he asserted, "It could happen especially when that union is the UAW. They have called many strikes—some of them long, brutal and bloody." Enclosed with the letter was a copy of a pamphlet, issued in April 1955 by the Kohler Company of Kohler, Wisconsin, portraying in a photograph on its cover Kohler's view of the violent strike which began there in 1954. Inside, the pamphlet lists asserted UAW abuses such as "serv[ing] only the Marxist doctrine" (R. 28; GCX 17a & b).

On June 10, 1965, the day before the election, President Weitzel spoke to employees in the shop by telephone transmitted through a public address system. He appealed to employees to reject the Union. He stated "If we have problems, let's solve them ourselves. That is why we have our shop committee. . . ." He later stated that if the Union won the election, "the very life of this Company—may be—your job—all our jobs—would depend upon our resistance to any economically unsound demand." He ended by saying, "If you vote for the union, you are saying that I don't deserve 'to keep my business.' A vote for the union is a vote against me personally . . ." (R. 28; GCX 19, Tr. 60).

E. The Company discharges Union Leaders Cantrell and Klein

Alfred Cantrell, was a milling machinist on the night shift and an outspoken union advocate (R. 33; Tr. 117, 137, 1178, 1358). He was fired on May 11, 1965, one month before the election (R. 33; Tr. 129). Cantrell had attended union meetings, solicited authorization card signatures, and talked up the Union in the shop (Tr. 118-120). As previously noted, Vice-President Fink had questioned him about one union meeting and at that time Cantrell refused to supply Fink with the names of those who attended (*supra*, p. 5). Later, in early April, Personnel Manager Howard Berno introduced Cantrell to a psychology professor, Howard Schwartz, who was visiting the plant, as the "strongest Union man in the shop" (R. 31; Tr. 124-125). Berno left and Schwartz questioned Cantrell as to why he supported the Union (R. 31; Tr. 126).

On Cantrell's last day of work he was notified by a temporary foreman, Paul Mansfield, that the Company was laying him off. Mansfield could not supply Cantrell with a reason for his selection, but stated that

this "makes me more for the Union" (R. 34; Tr. 129-131). The next day, May 12, Cantrell went to Fink's office. Fink told him he was being laid off because of a shortage of work (R. 34; Tr. 132). Cantrell told Fink about an ad, placed in that day's paper by the Company, seeking a jig-bore machinist. Fink at first denied the Company was looking for a machinist, but was informed by Personnel Manager Berno, who was also present, that there was indeed such an ad. Fink then told Berno to remove the ad (R. 34; Tr. 132-135, GCX 26 and 27). Cantrell was not offered the job nor was he recalled (R. 34; Tr. 139).

Irving Klein, a tool and gauge maker with some 23 years' experience, was fired on June 25, 1965, shortly after the Union filed objections to the election (*infra*, p. 13). Klein was notified by Union Representative Sloane of the industry-wide organizational campaign and he began to solicit union support at the shop beginning in mid-February, 1965 (R. 25; Tr. 270-272). He was active in the union campaign, attended union meetings and solicited authorization cards from employees (R. 25; Tr. 270-273). The Company interrogated him about what the Union could do for the Company and he replied that what was important was what the Union could do for the trade (Tr. 275). Howland twice warned him that the Company could go out of business if the Union won representation (Tr. 275, 278). On another occasion, Howland approached Klein and stated, "Irving, you don't look like an organizer to me". When Klein objected, Howland replied that he did not mean a "paid" organizer, but that he considered all employees campaigning for the union organizers (R. 67; Tr. 276-277, 1113-1114).

On the day of Klein's discharge, Foreman Franz Isak called him into an office and, in the presence of Personnel Manager Howard Berno, told

him that he had been “following [Klein] around”, that Klein “was too slow” and he had to “let [Klein] go” (R. 26; Tr. 282). At this time and without explanation Isak handed Klein a profit and loss statement, but before Klein had a chance to study it, Berno took it back (Tr. 282). Isak then handed Klein a discharge slip and his final two checks (Tr. 282).

F. The Union loses the election and files objections

On June 11, 1965, the election was held. Of the 115 eligible voters, 40 voted for the Union and 59 against (R. 27; GCX 1(d)).⁵ By telegram on June 17, 1965, the Union filed timely objections to the election (R. 27; GCX 1(p)). On July 6, 1965, the Union filed the first of several charges alleging the Company had committed unfair labor practices and a complaint issued (GCX 1(f)(j)). The Regional Director ordered a hearing to resolve the issues raised by the Union’s objections to the election, and that hearing was consolidated with the unfair labor practice hearing (R. 27; GCX 1(e)).

II. THE BOARD’S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that the Company violated Section 8(a)(1) of the Act by granting wage increases, interrogating employees and threatening plant closure and loss of jobs if employees selected the Union. It also found that the Company’s domination and interference with the Grievance Committee violated Section 8(a)(2) and (1) of the Act

⁵The Board, in the instant case, upheld the Regional Director’s determination of the appropriate unit (R. 29):

All production and maintenance employees employed by the Employer at its Los Angeles, California plant, including the production liaison employees, inspectors, inspector trainee and draftsmen tool; but excluding all office clerical employees, professional employees, guards, watchmen and supervisors as defined by the Act.

and its discriminatory discharges of employees Cantrell and Klein violated Section 8(a)(3) and (1) of the Act. The Board further found that the Company unlawfully refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act as it represented a majority of the employees in the appropriate unit (R. 67-68, 29-30, 38-39, 32-33).⁶

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires the Company to disestablish the Grievance Committee; offer full reinstatement with backpay to Cantrell and Klein; upon request, bargain collectively with the Union, and post appropriate notices (R. 39-40, 69).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY GRANTING WAGE INCREASES TO DISCOURAGE UNION SUPPORT; INTERROGATING EMPLOYEES AS TO UNION ACTIVITIES; AND THREATENING EMPLOYEES WITH PLANT CLOSURE AND LOSS OF JOBS IF THEY SELECTED THE UNION

A. The Wage Increases

It is settled law that the granting of economic benefits to discourage support for a union violates Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405. As the Supreme Court there stated, "The danger inherent in well timed increases in benefits is the suggestion of a

⁶The Board also set aside the election in which the Union was defeated and vacated all proceedings in connection therewith, because of the Company's unlawful conduct which interfered with the free choice of employees (R. 33, 40).

fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” (*Id.* at 409). We submit that the raises awarded here are clearly unlawful under this rule. The Company’s granting of wage increases to some 65 employees at the very beginning of the Union campaign was manifestly timed to influence employee choice. In mid-February, 1965, the Company learned of employee support for the Union and dissatisfaction with wages. On March 8, only a week and a half after many employees had attended the first Union meeting and a majority had signed authorization cards, the Company put the raises into effect. At this time, as Vice-President Fink admitted, the Company was fully aware of the Union campaign among its employees (Tr. 83-84). Moreover, the next day, President Weitzel suggested that there was no need for an outside union and urged formation of an unlawfully controlled grievance committee (*infra*, pp. 24-25). In these circumstances, the Board could properly conclude that the Company’s action was unlawful. See *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664, 665-667 (C.A. 9), cert. denied, 379 U.S. 930; *N.L.R.B. v. Douglas & Lomason, Co.*, 333 F.2d 510, 513-514 (C.A. 8); *N.L.R.B. v. Universal Packaging Corp.*, 361 F.2d 384, 387 (C.A. 1); *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 203 (C.A. 10). Contrary to the Company’s contention (Br. 90), the coercive impact of such action is not dependent on whether the Union had requested recognition. In *N.L.R.B. v. Laars Engineers, supra*, this Court held that a wage increase was unlawful even though no recognition request had been made and the only union activity was the distribution of literature.

The Company's contention (Br. pp. 90-91) that the wage increases were unrelated to the contemporaneous union activity is without merit. The Company's alleged decision to conduct a wage survey in December, 1964 was not announced anywhere but in the councils of management. Indeed, the decision appears to have been prompted by a realization that the Union was trying to organize the industry in that area (Tr. 753, 1145) since the Company had just given raises 5 months before (Tr. 939, RX 10). Instead, the Company chose to announce and implement the raises at a time of maximum impact. It also expanded the coverage of the proposed raises, which originally applied only to "top rated" employees, to embrace employees in all classifications, some of whom had not been covered in the survey (Tr. 1146-1150, GCX 106). Thus, the Board could properly reject the exculpatory testimony of Company officials. See *N.L.R.B. v. Laars Engineers, supra*.

B. The unlawful questioning of employees

As this Court has recognized, "Interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information [sought]". *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904. And, "Whether the Company would be disposed to make use of the [information] is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done." *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 592 (C.A. 9). In accord is the Second Circuit which has recently affirmed that, even where there are no explicit threats, interrogation is unlawful if "the circumstances indicate that coercion is implicit in the questioning" *N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 137 (C.A. 2). Relevant circumstances include whether there is

a background of employer hostility and other unlawful activity; whether the employer seeks information to test a claimed majority or seeks to ferret out information most useful for purposes of discrimination, as when employees are asked to identify union supporters; or whether the identity of the questioner, for example a high management official, might create an aura of coercion. *N.L.R.B. v. Milco*, *supra*. See also *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 843 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 728 (C.A. 9); *Jervis Corp. v. N.L.R.B.*, 387 F.2d 107, 111 (C.A. 6); *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 812 (C.A. 4), cert. denied 382 U.S. 831; *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 804-807 (C.A. 5), cert. denied, 382 U.S. 926; *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F.2d 732, 742-744 (C.A.D.C.), cert. denied, 341 U.S. 914.⁷

The Board's conclusion that the widespread interrogation engaged in by the Company here (*supra*, pp. 4-5) was coercive and therefore illegal is clearly correct. Particularly relevant is the fact that two high ranking officials, Vice-President Fink and Plant Superintendent Howland, undertook much of the questioning. Fink's request that employee Cantrell supply him with names of those who attended the first Union meeting obviously sought "information most useful for discrimination" *N.L.R.B. v. Milco*, *supra*. When Howland questioned Klein he mentioned the possibility that the Company could go "out of business" if the Union came in; and he told employee Ahlstrom "there would be benefits" (*supra*, p. 5). In addition,

⁷The Company's assertion (Br. 83) that Section 8(c) of the Act protects interrogations unless accompanied by threats of reprisal or promises of benefit is contrary to all the authorities and the language of the Act. Interrogation is something more than simply the "expressing of any views, argument or opinion" (*infra* p. 19, n. 10). See, e.g., *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F.2d 417, 420 (C.A. 5). The cases cited by the Company do not support its contention; they simply hold that on the facts in those cases the questioning was not coercive.

management officials instructed foremen and leadmen (admitted supervisors (Tr. 718)) to obtain information concerning union sympathies of employees in their department which they later conveyed to Howland. The Examiner concluded (R. 32, 30), in part from his observation of the witnesses, that some of this information was obtained through questioning. For example, Vernon Zeeman, a leadman, testified he reported what he “could get out of” an employee (R. 32; Tr. 1624); and Foreman Walter Payton admittedly asked another employee how he felt about the Union (Tr. 1477). In carrying out their function of making determinations as to the credibility of witnesses, the Examiner and the Board properly rejected testimony that all such information was provided voluntarily (See cases cited *infra*, p. 39).⁸

Furthermore, all of the questioning bore the aura of the Company’s known hostility toward the Union, evidenced especially, as the Examiner noted (Br. 32), by the threats that the Company could go out of business because of the Union. President Weizel made this threat in a speech to all employees in which he also suggested formation of a company-dominated committee to combat the Union. It is also significant that the Company had no legitimate reason to question employees about their union activities or sympathies. The Company’s interrogations, in the main, were undertaken before receipt of the Union’s bargaining demand. Thus, the

⁸ Apart from constituting interrogation, coercive in context, such activity is akin to unlawful surveillance of union activity (cf. *N.L.R.B. v. Collins & Aikman Corp.*, 146 F.2d 454, 455 (C.A. 4)) especially when it is undertaken at the behest of management (see *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 812 (C.A. 4), cert. denied, 382 U.S. 831). “[I]ntentional eavesdropping [is] likely to deter free discussion by employees of self-organizational matters.” *N.L.R.B. v. Clark Bros. Co.*, 163 F.2d 373, 375 (C.A. 2).

interrogation was not in support of a good faith effort to ascertain the validity of union authorization cards. This distinguishes the interrogation in the instant case from the limited questioning, free from coercion, sanctioned by this Court in *Don the Beachcomber v. N.L.R.B.*, 390 F.2d 344, cited by petitioner (Br. 83). See *N.L.R.B. v. Milco, supra*. Nor was the questioning accompanied by statement of a business purpose or assurances against reprisal. The coercive effect was thus “more likely.” *N.L.R.B. v. Camco, Inc., supra*, 340 F.2d at 806-807. See also, *N.L.R.B. v. California Compress Co.*, 274 F.2d 104, 106 (C.A. 9); *Blue Flash Express Co.*, 109 NLRB 591; *Struksnes Const. Co.*, 165 NLRB No. 102, 65 LRRM 1385, 1386.⁹

C. Threats

The Board also properly found that the Company’s emphasis in speeches and letters to employees on the possibility that it would close its plant and that employees would lose their jobs if they selected the Union exceeded the bounds of free speech and violated the Act.¹⁰ The statute

⁹The Company cannot disavow the conduct of its leadmen and foremen (Br. 83-84) who were instructed by management to seek out information of union support. Clearly, the employees could “reasonably believe that in making [the statements, the foremen and leadmen were] acting for and on behalf of management.” *N.L.R.B. v. Geigy Co.*, 211 F.2d 553, 557 (C.A. 9), cert. denied, 348 U.S. 821; *Betts Baking Co. v. N.L.R.B., supra*, 380 F.2d at 202 and cases there cited. This also applies to the questioning of Cantrell by Personnel Manager Berno’s professor friend (*supra* p. 11). See *Amalgamated Clothing Workers (Hamburg Shirt Corp.) v. N.L.R.B.*, 371 F.2d 740, 744 (C.A.D.C.); *Colson Corp. v. N.L.R.B.*, 347 F.2d 128, 137 (C.A. 8), cert. denied, 382 U.S. 904. Nor can the Company contend successfully that it should escape liability for the one incident of interrogation it asserts (Br. 84) was conducted in a “friendly and joking atmosphere.” See, *A.P. Green Fire Brick Co. v. N.L.R.B.*, 326 F.2d 910, 914 (C.A. 8); *N.L.R.B. v. Marval Poultry Co.*, 292 F.2d 454 (C.A. 4).

¹⁰Section 8(c) of the Act provides that “the expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”

prohibits implied or direct suggestions that in reprisal for unionization the employer will make economic decisions adversely affecting employment, thereby “making anticipated events the subject of threats . . . to force abandonment of the Union by the employees”. *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829. Accord: *N.L.R.B. v. Plant City Steel*, 331 F.2d 511, 513 (C.A. 5). “It is well settled that an employer’s ‘prediction’ of untoward economic events may constitute an illegal threat if the employer has it within his power to make the prediction come true.” *International Union of Electrical Workers, etc. v. N.L.R.B.*, 289 F.2d 757, 763 (C.A.D.C.). Accord: *N.L.R.B. v. TRW Semiconductors, Inc.*, 385 F.2d 753, 758 (C.A. 9). Plant closures are uniquely within the power of management and hence employer threats that such action will follow unionization are unlawful. *N.L.R.B. v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n. 20. Thus, in order to be protected, “[T]he employer’s prediction must be in terms of demonstrable ‘economic consequences,’ *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 761 (6th Cir. 1965).” *N.L.R.B. v. Sinclair Co.*, 68 LRRM 2720, 2721-2723 (C.A. 1, decided July 3, 1968). See also *N.L.R.B. v. Kolmar Laboratories, Inc.*, 387 F.2d 833, 837 (C.A. 7).

In his March 9 speech, President Weizel stated that organized shops elsewhere were barely surviving and that the Company “could” go out of business because of the Union. The statement was coupled with the suggestion that the Company could solve its own problems through a company-dominated grievance committee. It is plain that Section 8(c) does not insulate Weizel’s speech. It obviously amounted to more than a general prediction of economic consequences beyond the Company’s power to control. Weizel cited no competitive reasons for the probable

shutdown; nor did he suggest that the Union would strike or impose any unreasonable demands if it succeeded in obtaining bargaining rights. Furthermore, he made it plain that the employees could expect benefits from the Company through the grievance committee and not through the Union. Here, as in *N.L.R.B. v. Realist*, 328 F.2d 840, 843 (C.A. 7), cert. denied, 377 U.S. 994, Weizel's statement that the Union could shut down the Company constituted a "veiled or implied threat to [shut down] . . . if the union prevailed" and the reference to the unlawful grievance committee "conveyed the idea that . . . the company would afford benefits equally as good if not better to its employees if there were no union." See also, *N.L.R.B. v. Geigy Co.*, 211 F.2d 533, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. V. C. Britton Co.*, 352 F.2d 797, 798-799 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 728; *N.L.R.B. v. Parma Water Lifter*, *supra*, 211 F.2d at 262; *Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 760-761.

Also coercive was the repeated theme in the Company's election campaign that three named tool and die shops in the area—Mars, Alba and Falco—had closed because the Union won representation there. These assertions did not involve predictions of any sort. The Company simply characterized past events as fact. The implication, however, was plain that the Company would shut down just as its competitors had if the employees selected the Union. Unsupported statements to employees that other plants have closed because of union representation are unlawful veiled threats that the Company will do likewise. *N.L.R.B. v. Realist, Inc.*, *supra*, 328 F.2d at 843; *Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 761; *Gotham Shoe Mfg. Co.*, 149 NLRB 862, 869-870, enforced, 359 F.2d 864, 865 (C.A. 2). Here, as the Examiner found (R.

30), the Company had no factual or legal basis for making such statements. Vice-President Fink, who was responsible for the statements, admitted he had no knowledge of why the three area plants had closed (R. 30; Tr. 890, 892).¹¹ In these circumstances, the Company is not entitled to the protection of Section 8(c). In determining whether a statement amounts to an implied threat or a protected prediction of events outside the Company's control, the Board may properly consider whether "the utterer had some reasonable basis for it." *International Union of Electrical Workers v. N.L.R.B.*, *supra*, 289 F.2d at 762-763. Accord: *N.L.R.B. v. Miller*, 341 F.2d 870, 872-873 (C.A. 2); *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880, 881 n. 1 (C.A. 1); and see, *N.L.R.B. v. Harrah's Club*, 362 F.2d 425 (C.A. 9), cert. denied, 386 U.S. 915, enforcing 150 NLRB 1702, 1717-1720.

Nor can the Company's other statements, raising as issues in the Union campaign its ability to stay in business, the possibility of losing customers and job security (Br. 87, *supra* pp. 9-11) be viewed in a vacuum. As the Seventh Circuit has stated (*N.L.R.B. v. Kropp Forge Co.*, 178 F.2d 822, 828-829, cert. denied, 340 U.S. 810):

In determining whether such statements and expressions constitute, or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. If, when so considered, such statements form a

¹¹Fink later testified to hearsay statements from former employees of two of the companies "quite some time ago" that the companies closed because of the Union (Tr. 990-993). Nor did the Company call any witness to substantiate the claim made in a letter to employees—solicited by the Company and purportedly sent by the former president of Falco—that Falco had closed because of the Union (R. 30).

part of a general pattern or course of conduct which constitutes coercion and deprives the employees of their free choice guaranteed by section 7, such statements must still be considered as a basis for a finding of an unfair labor practice.

As shown above, Company based a good deal of its anti-union campaign upon unsupported or unexplained facts as to union-caused shutdowns elsewhere. Moreover, in view of the Company's other coercive conduct, the employees could readily discern the Company's ability and intent to carry out its "predictions." In these circumstances the Board could properly discount subtle attempts to shift responsibility for inherently management-controlled consequences to unreasonable union demands or union-caused strikes and inefficiency, and conclude that they constituted unlawful threats of economic reprisal. See, *Surprenant Mfg. Co. v. N.L.R.B.*, *supra*, 341 F.2d at 761; *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 702-703 (C.A. 8); *N.L.R.B. v. Kolmar Laboratories*, *supra*, 387 F.2d at 836-838; *N.L.R.B. v. Sinclair Co.*, *supra*, 68 LRRM at 2722; *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 371 (C.A. 7); *Corrie Corp. of Charleston v. N.L.R.B.*, 375 F.2d 149, 153 (C.A. 4); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 180 (C.A. 2).

Cases cited by the Company (Br. 87-88) such as *N.L.R.B. v. TRW Semiconductors, Inc.*, *supra*, 385 F.2d 753 and *N.L.R.B. v. Golub Corp.*, 388 F.2d 921 (C.A. 2), where there were no other violations of the Act found, are manifestly not in point. Here it was reasonable for the Board to consider the Company's statements of loss of jobs and plant shutdown in the context of its other unlawful activity, as well as the circumstances surrounding the statements themselves. The line between lawful speech and unlawful threats may be close, but "one who engages in brinksmanship

ship may easily overstep and tumble into the brink.” *Wausau Steel Corp. v. N.L.R.B.*, *supra*, 377 F.2d at 372.

II.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DOMINATED AND INTERFERED WITH THE EMPLOYEE GRIEVANCE COMMITTEE IN VIOLATION OF SECTION 8(a)(2) AND (1) OF THE ACT

We submit that the evidence amply shows that the Company dominated and interfered with the formation and administration of the employee Grievance Committee in violation of Section 8(a)(2) and (1) of the Act.¹² Far from being *de minimis*, as the Company asserts in its brief (Br. 93), the overwhelming evidence of Company interference and domination herein shows a callous disregard of employee rights and of the “unhampered freedom of choice which the Act contemplates” *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 80. Indeed, the Company’s grip on employees through the Grievance Committee remained intact and had its obvious intended effect throughout the critical period of the Union’s demand, the Company’s refusal to bargain and the election campaign.

Although, as the Company concedes, there was indeed a “closeness in time” (Br. 93) between the formation of the Committee and election, the evidence shows much more. As shown above (*supra*, pp. 6-7) the Committee became active and began functioning immediately after the Company suggested it and employee representatives were elected the same

¹²Section 8(a)(2) makes it an unfair labor practice for an employer:

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; . . .

day. The night supervisor presided over the selection of some employee representatives. Management decided when meetings would be held and notified the employee representatives. The meetings were held on Company property, employees were paid for attending, and management took minutes of the meetings and distributed them. The Committee never met independently outside the presence of management and it had no constitution or by laws; nor did it collect dues. This evidence fully supports the Board's finding of a violation. See, *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 213-214; *American President Lines, Ltd. v. N.L.R.B.*, 340 F.2d 490 (C.A. 9); *N.L.R.B. v. H & H Plastics Mfg. Co.*, 389 F.2d 678, 680-681 (C.A. 6); *N.L.R.B. v. Buitoni Foods Corp.*, 298 F.2d 169, 173 (C.A. 3); *N.L.R.B. v. Standard Coil Products*, 224 F.2d 465 (C.A. 1), cert. denied, 350 U.S. 902; *N.L.R.B. v. Philamon Laboratories*, 298 F.2d 176, 181 (C.A. 2), cert. denied, 370 U.S. 919. Furthermore, at the meetings, employees were invited to suggest changes in terms and conditions of employment. Management officials discussed these proposals, promised improvements and in some cases made appropriate changes. The Company also made a point of notifying the employees of all items discussed at the meetings and told them that changes would be forthcoming. Thus, it can hardly be denied that the Company was "dealing with" the Committee as a labor organization within the meaning of the Act. *N.L.R.B. v. Cabot Carbon Co.*, *supra*, 360 U.S. at 214.¹³

¹³The Company erroneously asserts (Br. 92) that it is "undisputed" that a committee "similar" to the grievance committee existed prior to the onset of the Union. In support of this assertion the Company cites testimony of Vice-President Fink obviously referring to the safety committee, whose aims were unrelated to the grievance committee. Fink later testified that he could not recall "any kind of committee" such as the grievance committee being in existence in the past (Tr. 884).

III.

SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCRIMINATORILY DISCHARGING EMPLOYEES ALFRED CANTRELL AND IRVING KLEIN FOR THEIR UNION ACTIVITIES

As shown in the Counterstatement (*supra*, pp. 11-13), the Company discharged two of the leading union advocates, employees Al Cantrell and Irving Klein. The Board found that these employees were discharged for their union activities. The Company contended that they were terminated for cause. But this "self serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances * * *" *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 471 (C.A. 9). The question is one of fact and, if supported by substantial evidence, the Board's finding must stand even if the reviewing court would have decided the case differently *de novo*. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488; *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*; *Aeronca Mfg. Co. v. N.L.R.B.*, 385 F.2d 724, 727 (C.A. 9).

Cantrell

The Company discharged Al Cantrell who was identified as "the strongest Union man in the shop" (*supra*, p. 11) at the height of the election campaign. Supervisor Walter Payton called Cantrell a very "outspoken" union advocate (Tr. 167) and had reported him to Howland (Tr. 1198). Fink interrogated Cantrell about his union activities, trying to get Cantrell to supply him with names of employees who attended a recent union meeting (*supra*, p. 5). The Company contends that Cantrell was laid-off—not discharged—because of a reduction in his type of work (Br. 94). But Cantrell was never recalled from layoff status and, as a practical matter,

he was fired, abruptly and without notice or warning. In view of these circumstances and the Company's manifest anti-union hostility, the Board could well conclude that the Company discharged Cantrell for his union activities. See *Aeronca Mfg. Co.*, *supra*, 385 F.2d at 728; *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*, 362 F.2d at 471; *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699-700 (C.A. 8).¹⁴

The Company's explanation for Cantrell's termination "fails to withstand scrutiny" and further supports the inference of discrimination. *N.L.R.B. v. Dant & Russell*, 207 F.2d 165, 167 (C.A. 9). As the Board found (R. 68), the evidence refutes any suggestion that there was a decrease in work at the time of Cantrell's discharge. He was working a 54 hour week and most of the employees were working substantial overtime even after the discharge (R. 68; Tr. 1198-1200, 133, 138, 1697-1698, 145-146). The Company apparently recognizes this anomaly and counters that it needed jig-bore machinists and Cantrell did not fit the bill (Br. 94). But the Company offered a jig-bore job to Cantrell in January, 1965, before the start of union activity in the shop, because he was a good machinist; at that time, Cantrell declined the job because he preferred to remain where he was (R. 68; Tr. 136, 177, 1182). When he was laid off, ostensibly for lack of work, the Company was running a newspaper ad for a jig bore machinist (R. 68; Tr. 132-135). The ad made no reference to experi-

¹⁴Of course, it is no defense to a charge of discrimination, as the Company contends (Br. 94-95), that it did not fire all the union adherents or that it discharged others who were non-union. See *N.L.R.B. v. Shedd-Brown Mfg. Co.*, 213 F.2d 163, 174-175 (C.A. 7); *Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 424 (C.A. 7). It is significant, however, that employee Victor Stone, who was laid off at the same time as Cantrell (Br. 95) was, unlike Cantrell, recalled or rehired in July 1965 (Tr. 1315-1317). Stone had not signed a Union card (see Company Brief, p. 10) and there is no evidence in the record that he was in any way active on behalf of the Union.

ence being required (GCX 26, 27). Nevertheless, the Company did not offer the open spot to Cantrell even though he testified without contradiction that he told Fink that he had jig-bore experience and wanted the job (Tr. 139, 174-175).¹⁵ The Company's suggestion (Br. 95-96) that its failure to offer him the job could have been due to the fact that he turned it down earlier misses the mark. In January, Cantrell was permitted to turn down the job, which offered him no immediate increase in pay (Tr. 143) and still remain employed; but in June he was terminated without even being offered the open spot. The significant intervening factor was, of course, Cantrell's union activity.

Klein

The evidence also amply supports the Board's finding that the Company discriminatorily discharged Irving Klein. He had initiated the union campaign among Company employees in mid-February, 1965 (Tr. 270). When he was notified by Union Representative Sloan of the industry-wide organizational campaign, Klein began to solicit union support at the shop; he attended union meetings, solicited authorization cards and was "very active" in the election campaign (Tr. 270-271). The Company knew of his activities. Both Howland and Klein testified that, in one conversation between them, Howland told Klein that he did not look like a "paid" or "professional" organizer (*supra*, p. 12). The Board could properly give this conversation its plain meaning (R. 67) despite the Company's suggestion that Howland could have been "jesting" (Br. 97). Indeed, Howland thought enough of Klein's pro-union influence on employees that he

¹⁵Nor was Cantrell offered any other job although the Company had other work. In addition to the continued use of overtime, the Company had a standing offer of a \$50 bonus to employees who recruited skilled machinists (R. 68; Tr. 177, 1197). It seems unlikely, under ordinary circumstances, that the Company would have permanently released a skilled machinist like Cantrell, who was hired as a general machinist and could operate several different types of machines (Tr. 137, 140-143).

approached or interrogated him about the Union on at least two other occasions (*supra*, p. 12).

Klein was discharged shortly after the election and after the Union had filed objections to overturn it. His discharge at this time assured the Company of not having to contend with him in a second election campaign and made abundantly clear the Company's refusal to tolerate union activity among remaining pro-union employees. The discharge thus "discourage[d] membership in any labor organization." Section 8(a)(3). In view of the Company's pervasive unfair labor practices, the possibility of a second election was in no way remote, as suggested by the Company in its brief (Br. 96). The Board is not required to close its eyes to the effects of discriminatory employer action subsequent to a union's election defeat. See, *N.L.R.B. v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 693 (C.A. 8).¹⁶

The Company's claim that Klein was discharged for poor production does not "ring true" (*Burk Bros. v. N.L.R.B.*, 117 F.2d 686, 687 (C.A. 3), cert. denied 313 U.S. 588); see *Shattuck Denn Mining Corp. v. N.L.R.B.*, *supra*, 362 F.2d at 471. Just three months before, it gave him a 15¢ raise and Howland told him he was a "top man" (R. 35; Tr. 294). Thereafter Howland told Klein, a veteran toolmaker with twenty-three years of experience, not to worry about certain so-called profit and loss statements, which the Company now contends form the basis for Klein's discharge (Br. 98). Howland also told Klein that "the way the company delegates jobs,

¹⁶In that case, the employer announced wage increases subsequent to an election in which the Union had been defeated but before objections had been filed; and it granted the increases while the objections were pending. The Eighth Circuit found this conduct unlawful because it created the impression that further benefits would be forthcoming "if there were a continued rejection of unionization." 379 F.2d at 692.

they either make or break a man by giving him a job that was close or not close—timewise . . .” (R. 36-37; Tr. 295-297).¹⁷ Howland’s assurances to Klein show that the Company put little stock in the profit and loss statements, at least as they applied to the type of jobs “delegated” to Klein. Howland was apparently more concerned with the quality of the work of an experienced toolmaker like Klein than with his speed. The evidence is clear that Klein was never criticized about the quality of his work (R. 37; Tr. 318-319, 297-298). Moreover, the Company did not rebuke or discharge Klein in December 1964 when, as the Company states in its brief, “the majority of his jobs were losses” (Br. 98). Obviously, Klein “became intolerable” only after the onset of the Union on whose behalf he actively campaigned. See, *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 366 (C.A. 6).

IV.

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN COLLECTIVELY WITH THE UNION

Section 8(a)(5) of the Act requires an employer “to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).” That section provides that “Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive

¹⁷The Board found that the statements do not accurately measure production. According to the Company’s system, each job assigned to a tool maker like Klein is estimated in terms of hours and costs. Other employees may work on the job for special cutting or boring operations, but the tool maker who is assigned the job is charged with all time spent in completing the project. The difference between the estimated and actual cost represents profit or loss. As the Examiner found, the statements do not account for low estimates or delays by workers other than the tool maker assigned the job. (R. 36; Tr. 1130, 1189-1191, 1256-1259, 1264, 1284, 287-293, 322). Thus,

representatives of all the employees in such unit * * *.” Although under Section 9(c)(1) the Board conducts elections to determine representative status, it has long been settled that such status may be shown by other means. See, *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72. Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he refuses to recognize or bargain with the union and such refusal is not motivated by a good faith doubt of the union’s majority. *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 846-847 (C.A. 9); *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725, 726-727 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961; *Snow v. N.L.R.B.*, 308 F.2d 687, 691, 694 (C.A. 9); *N.L.R.B. v. Trimfit of California, Inc.*, 211 F.2d 206, 209-210 (C.A. 9); *N.L.R.B. v. Atco Surgical Supports, Inc.*, ___ F.2d ___, 68 LRRM 2200, 2201 (C.A. 6, decided May 10, 1968); *N.L.R.B. v. Goodyear Tire & Rubber Co.*, ___ F.2d ___, 68 LRRM 2137, 2137-2138 (C.A. 5, decided May 6, 1968).

In such circumstances a bargaining order is the appropriate remedy. As the Fifth Circuit recently stated (*N.L.R.B. v. Goodyear Tire & Rubber Co.*, *supra*):

[S]uch an order is clearly within the Board’s discretion, especially when the employer has engaged in unfair labor practices such as is the case here. [Citations omitted.] It is equally so where the employer takes the bold course of refusing to bargain as the means of testing representation of a majority. Even more so is it when this intransigence flows from an inflexible company policy of ignoring authorization cards and insisting on a Board election as the price for bargaining. Of course the

the fact that several days before Klein’s discharge Foreman Isak told him that he was not planning his jobs properly is of no particular consequence. Isak accepted Klein’s answer that he could not be responsible for the hours used by other employees (R. 26; Tr. 281-282).

fact that the Union's majority may have been dissipated during the pendency of the present action affords no defense to the employer. Such reasoning would allow the employer to profit by his own wrongdoing and would encourage, not discourage, the very activities which the law so plainly forbids.

Accord: *N.L.R.B. v. Gordon Mfg. Co.*, ___ F.2d ___, 68 LRRM 2457, 2458 (C.A. 6, decided, June 6, 1968). These principles also apply where the union, after its card majority is rejected by an employer, chooses to go to an election which is invalidated because of employer misconduct. *Bernel Foam Products, Inc.*, 146 NLRB 1277; *Master Transmission Rebuilding Corp. v. N.L.R.B.*, 373 F.2d 402 (C.A. 9); *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 845, 847; *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 853 (C.A. 1); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2); *N.L.R.B. v. Frank C. Varney Co.*, 359 F.2d 774, 775-776 (C.A. 3). As these cases illustrate, where an election has been rendered an imprecise indicator of employee choice because of an employer's misconduct, the Board may properly determine union support by the only means possible at or near the time of the bargaining demand and provide a remedy for the employer's misconduct.

We show below that a majority of the employees had selected the Union; that the Company's refusal to bargain was not motivated by a good faith doubt of majority status; and that, in the circumstances of this case, the Board properly ordered the Company to bargain with the Union.

A. The Union represented a majority of the employees

The Union's majority status as of March 12, 1965, when it requested recognition, is established by authorization cards signed by 68 of the 114 or 115 employees in the concededly appropriate unit (*supra*, p. 8). In responding to the Union's demand the Company stated that it had "no

knowledge of the authenticity of any authorization cards that you claim to have or the circumstances under which they may have been obtained” (*supra*, p. 9). However, at the hearing, the Company challenged the Union’s majority on the grounds that three of the cards were not properly authenticated and, secondly, that some employees were induced to sign their cards by misrepresentations of their purpose attributable to Union solicitation. Both of these attacks, we submit, were properly rejected by the Board.

*1. The authenticity of the cards of Anathaiwongs,
Doebler, and Meier*

Initially, the Company objects to the introduction into evidence of the cards of employees Anathaiwongs, Doebler, and Meier (Br. 11). These employees were unavailable at the time of the hearing (Tr. 1739-1740). Their cards were authenticated, as were others, by a handwriting expert. In addition, the authenticity of these cards was established by the undisputed testimony of other witnesses. It is settled law that authorization cards may be authenticated by such means. *N.L.R.B. v. Howell Chevrolet Co.*, 204 F.2d 79, 85-86 (C.A. 9), *aff’d* on other grounds, 346 U.S. 482; *N.L.R.B. v. Howard Cooper Corp.*, 259 F.2d 558, 560 (C.A. 9); *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 9), *cert. denied*, 312 U.S. 678; *Colson Corp. v. N.L.R.B.*, 347 F.2d 128, 134 (C.A. 8), *cert. denied*, 382 U.S. 904.

The handwriting expert testified that the signature and date on the card of Anathaiwongs corresponded with the signature on his cancelled checks and insurance data (Tr. 191-192, 193-194), although the expert had no opinion as to whether it also corresponded with the writing on Anathaiwongs’ W-4 form (Tr. 250). However, employee Homnan testified that Anathaiwongs gave him a card, explained its purpose and filled it out

for him; he further testified that Anathaiwongs filled out his own card in Homnan's presence (Tr. 491-492), and told him that he would send both cards to the Union (Tr. 499). The handwriting expert was unable to authenticate Doebler's card because he did not have adequate samples with which to compare it (Tr. 204-205). But employee Irving Klein testified that he gave Doebler a card in early March (Tr. 305) and "noticed the card was filled out and completely signed" when it was returned to him (Tr. 307). The card is dated March 2, 1965 (GCX 55). Finally, it is undisputed that Meier, whom the Company knew to be "for" the Union at the time of the demand (RX 7), signed his card. Although the Company questions the date (Br. 12, n. 6), the card bears the date of February 28, the day of the first union meeting at which many employees signed cards (GCX 76). In contrast, "[T]here is nothing in the record to indicate there was any irregularity in connection with . . . [these cards]" *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 846, n. 3. Accordingly, they were properly received and counted by the Board.¹⁸

¹⁸ The Company also claims (Br. 13) that it should have been permitted to impeach the qualifications of the General Counsel's handwriting expert by cross-examining him as to the authenticity of other signatures unrelated to his direct testimony. But the Company conceded the expertness of the witness at the hearing (Tr. 257). Company counsel thoroughly cross-examined the witness and even introduced the testimony of another handwriting expert for impeachment purposes. In these circumstances, the Trial Examiner could properly limit the scope of the cross-examination. The discretion of the Examiner in this respect is not to be disturbed absent a "strong showing" of prejudice. *N.L.R.B. v. Phaostrom Instrument & Electronic Co.*, 344 F.2d 855, 857-858 (C.A. 9). In any event, even assuming that the Examiner's ruling was erroneous, the Company has not shown prejudicial error, since, as we have shown above, the authenticity of the three cards contested by the Company was established by other testimony. Furthermore, the Company did not come forward with any evidence which disputed such testimony.

2. *The validity of the cards*

The cards herein unambiguously state in bold letters, "Authorization to UAW," and further state that the signer "authorizes the Union to represent [him] in collective bargaining" (*supra*, p. 8, n. 4). Although the cards themselves make no mention of an election, the Company alleges that statements made to employees concerning a possible election negated the clear purpose stated on the cards and therefore warranted rejection of the card. However, it is clear that a card may be used for more than one purpose, such as, for example, to obtain a Board election. Section 9(c)(1) (A) of the Act provides that the Board will investigate an election petition filed by a union when it alleges that a "substantial number of employees wish to be represented for collective bargaining and that their employer declines to recognize their representative. . . ." The Board has concluded that it will conduct an election on a union's petition only if it "has been designated by at least 30 percent of the employees." Statements of Procedure of NLRB, Series 8, as amended, Section 101.18(a). Therefore, it is proper for a Union to state that a card may be used to obtain an election, for that is a correct statement of the law. As the Sixth Circuit has said, "[T]he signing of authorization cards [is] an essential preliminary to a union petition for an election"; and representations to that effect are truthful where the Union "did indeed seek an election." *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920; *United Automobile Workers (Preston Products Co) v. N.L.R.B.*, 392 F.2d 801, 807, n. 1 (C.A. D.C.), cert. denied, 68 LRRM 2408 (June 10, 1968). See also, *Atlas Engine Works, Inc. v. N.L.R.B.*, 68 LRRM 2635, 2636 (C.A. 6, decided June 28, 1968).¹⁹

¹⁹There is no inconsistency in the fact that a union seeks a Board election on the basis of cards, notwithstanding it already has a majority and the employer, as here, has refused to bargain with it. See, e.g., *N.L.R.B. v. Security Plating Co.*, 356 F.2d 725,

In order to invalidate a clear and unambiguous authorization card, it must be shown that the card was signed because of misrepresentations, attributable to the union, that the only purpose of the card was for an election, i.e., where the representations contradict the clear language of the cards. *United Automobile Workers (Preston Products Co.) v. N.L.R.B.*, *supra*, 392 F.2d at 807 (C.A. D.C.); *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.) v. N.L.R.B.*, 371 F.2d 740, 745 (C.A. D.C.); *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, *supra*, 380 F.2d 851 at 855-856; *Furr's, Inc. v. N.L.R.B.*, 381 F.2d 562, 567-568 (C.A. 10), cert. denied, 389 U.S. 840; *Englewood Lumber Co.*, 130 NLRB 394, 395. See also, *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 568 (C.A. 2), cert. denied, 68 LRRM 2408 (June 10, 1968); *N.L.R.B. v. Swan Super Cleaners, Inc.*, 384 F.2d 609, 618 (C.A. 6); and *N.L.R.B. v. Dan Howard Mfg. Co.*, 390 F.2d 304, 309 (C.A. 7).²⁰

Moreover, the employer bears the burden of establishing by clear and convincing evidence the existence of misrepresentations which would vitiate unambiguous cards. "A morass of hazy individual recollections of attendant circumstances will not suffice" *Amalgamated Clothing Workers*

727 (C.A. 9); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2). The election route is less costly and time consuming than an unfair labor practice proceeding. Moreover, a union, certified after a Board election, enjoys special benefits not available to unions recognized by other means such as protection of its representative status for 1 year (see *Ray Brooks v. N.L.R.B.*, 348 U.S. 96) and protection from raids from rival unions (see Section 8(b)(4)(C) and 8(b)(7) of the Act).

²⁰Contrary to the thrust of the Company's brief on this point (Br. 19-35), the courts have, on the whole, accepted the Board's view as to what amounts to misrepresentation. In *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced, 351 F.2d 917 (C.A. 6), the Board held that clear cards would be vitiated only if the solicitor indicated to the signer that the card would be used *only* for an election. As shown above, the District of Columbia, First, and Tenth Circuits have accepted the rule. Three other circuits—the Second, Sixth, and Seventh—have also approved the rule, but, in subsequent

(*Hamburg Shirt Corp.*) v. *N.L.R.B.*, *supra*, 371 F.2d at 745; *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, *supra*, 380 F.2d at 855; *N.L.R.B. v. Glasgow Co.*, 356 F.2d 476, 478 (C.A. 7); *N.L.R.B. v. Gordon Mfg. Co.*, *supra*, 68 LRRM at 2458 (“positive” misrepresentation needed); and see, *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 726-727; *N.L.R.B. v. Geigy Co.*, *supra*, 211 F.2d at 556; *Matthews & Co. v. N.L.R.B.*, 354 F.2d 432, 436-438 (C.A. 8), cert. denied, 384 U.S. 1002; *Furr’s, Inc. v.* cases, have rejected reliance upon use of the words “sole” or “only” for an election. These circuits hold that misrepresentation is shown by “words . . . clearly calculated to create in the minds of the one solicited a belief that the only purpose of the card is to obtain an election.” *N.L.R.B. v. Swan Super Cleaners, Inc.*, *supra*; see *N.L.R.B. v. Dan Howard Mfg. Co.*, *supra*; *Bryant Chucking Grinder Co. v. N.L.R.B.*, *supra*; (compare opinion of Judge Hays with that of Judge Friendly discussing his opinion in *N.L.R.B. v. Nichols*, 380 F.2d 438 (C.A. 2), relied on by the Company (Br. 21)). See also, *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2). The Board has recently affirmed its *Cumberland Shoe* rule while making clear that the rule was never intended to be a mechanical one. “It is not the use or non use of certain key or “magic” words that is controlling, but whether or not the totality of the circumstances . . . is such, as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.” *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1341-1342; see also *McEwen Mfg. Co.*, 172 NLRB No. 99, 68 LRRM 1343, 1349-1351.

The Company also relies on cases from the Fourth and Fifth Circuits which have apparently rejected the *Cumberland* rule. See, *Engineers & Fabricators, Inc. v. N.L.R.B.*, 376 F.2d 482, 486-487 (C.A. 5); and *Crawford Mfg. Co. v. N.L.R.B.*, 386 F.2d 367 (C.A. 4), cert. denied, 390 U.S. 1028. But these cases do not hold that the mere mention of an election vitiates clear cards. In *Crawford*, as the court stated (*id.* at 371), the “findings of the examiner . . . make an issue of whether . . . the cards were signed solely to procure an election.” Indeed, the Fifth Circuit has recently stated that its position “does not seem to differ from” *N.L.R.B. v. Swan Super Cleaners*, *supra*. *N.L.R.B. v. Lake Butler Apparel Co.*, 392 F.2d 76, 82. See also, *N.L.R.B. v. Phil-Modes, Inc.*, ___ F.2d ___, 68 LRRM 2380, 2381 (C.A. 5). As for the denial of certiorari in *Crawford*, emphasized by the Company (Br. 29), we point out that the Supreme Court has recently denied certiorari in *Bryant Chucking Grinder* and *Preston Products* also.

This circuit has no cases directly on point, although one such case which presents the issue is now pending before the Court (*N.L.R.B. v. South Bay Daily Breeze*, No. 21,949).

N.L.R.B., *supra*; *Bryant Chucking Grinder Co. v. N.L.R.B.*, *supra*. Of course, the Company must show not only the existence of a misrepresentation but also responsibility of the Union and reliance upon such misrepresentation by the employee.²¹

The Company's contention that the authorization cards herein were signed because of misrepresentations by the Union is completely at odds with the record. The evidence relied on by the Company—union-distributed circulars; discredited testimony concerning Union representative Sloane's remarks at a union meeting; and other testimony, some discredited, as to individual solicitation of employees—falls far short of meeting its burden of proof on this issue. In short, there is no clear showing by competent evidence that employees signed cards in reliance upon Union representations, contradicting the plain authorization language of the cards, that the only purpose of the cards was for an election.

At the outset, the Company has not shown that the card signers relied on statements in the union circulars when they signed their authorizations. Such reliance is a necessary element of the Company's proof. See *Bryant Chucking Grinder Co. v. N.L.R.B.*, *supra*, 389 F.2d at 571 (concurring opinion of Judge Friendly). Nearly all of the employees here had signed their cards *before* the issuance of the circulars, which were dated, as the Company states (Br. 37, 38), on March 3, 10, and 14; the circulars

²¹The Company seems to suggest that the General Counsel has the burden of proof on this issue (Br. 30). But the case it cites to support its contention, *N.L.R.B. v. Lake Butler Apparel Co.*, *supra*, 392 F.2d at 81-82, shows only that once the party attacking the cards makes a *prima facie* showing of misrepresentation, the burden of persuasion shifts to the General Counsel. We read *Crawford v. N.L.R.B.*, *supra*, 386 F.2d 367 (C.A. 4) in the same manner. See also, concurring opinion of Judge Friendly in *Bryant Chucking Grinder Co. v. N.L.R.B.*, *supra*, 389 F.2d at 570-571.

could not have influenced employees who had already signed cards. In any event, the circulars properly stated the Union's approach in organizing industry-wide and they referred to the signing of *authorization* cards. The Union's "intention to petition [for election] for each shop at the point where a substantial majority of the shop employees have signed and mailed in their Authorization Cards" (RX 4) does not contradict the meaning of signed cards clearly authorizing the Union to bargain and it correctly represents the law. Moreover, here the Union did in fact petition for an election seeking certification when the Company rejected its card majority. (See discussion and authorities cited *supra*, pp. 35-36, and n. 19).²²

The Company also attempts (Br. 40-46) to overturn the Trial Examiner and the Board's resolution of conflicting testimony. They credited the testimony of Union representative Sloane as to his remarks at a union meeting on February 28, 1965 (R. 24-25, 29). The Company thus undertakes a heavy burden, since credibility determinations are peculiarly within the province of the Trial Examiner and the Board and will not be overturned except in extraordinary circumstances. *N.L.R.B. v. Walton Mfg. Corp.*, 369 U.S. 404, 407-408; *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 846 (C.A. 9); *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377, 381 (C.A. 9). Sloane testified that he told employees that

²²The Company's reliance (Br. 59-64) on *Bauer Welding & Metal Fabricators, Inc. v. N.L.R.B.*, 358 F.2d 766 (C.A. 8), is misplaced. Unlike here, the union campaign was conducted "entirely by mail" (*id.* at 768), the cards were rendered ambiguous because they were attached to a letter to all employees which stated in "plain terms" that the cards "would only authorize [the Board] to conduct a secret election" (*id.* at 774) and the employees thereafter signed the cards. Here, the Union's circulars stated a lawful purpose for the cards and were distributed at a time when they could not have influenced the cards signed by the employees here, which were, in any event, clear on their face. See *Bryant Chucking Grinder Co. v. N.L.R.B.*, *supra*, 389 F.2d at 571. Compare, *Matthews & Co. v. N.L.R.B.*, *supra*, 354 F.2d at 436-438.

the Union would demand recognition on the basis of the cards, but that in all probability the Company would refuse to bargain and an election would be necessary (*supra*, pp. 3-4). He was corroborated by other testimony. Thus, employee Booze testified, "Mr. Sloane made the statement that if we had enough cards these cards would be presented to the Company and the Company would turn it down, and at that time we would have an election" (Tr. 1433). Employee Williams testified that Sloane said the Union needed "30 per cent for an election and if they got 50 plus one, they didn't have to have an election" (Tr. 468). And employee Garger testified that Sloane said that "at least 30 or 33 per cent was required for an election" and he "had an idea" that Sloane said the Union could represent the employees without an election (Tr. 1518) (see also, Tr. 530-531). Contrary testimony cited by the Company at pp. 40-46 of its brief was discredited by the Examiner and the Board (see discussion and cases cited *infra* pp. 42-46). In these circumstances, the Board properly credited Sloane whose statements were correct representations of the law. See, *N.L.R.B. v. Geigy Co.*, *supra*, 211 F.2d at 556; *Matthews v. N.L.R.B.*, *supra*, 354 F.2d at 437; *Atlas Engine Works, Inc. v. N.L.R.B.*, *supra*, 68 LRRM at 2636.

The Company's further attempt to show that individual Union solicitation vitiated all of the cards (Br. 46-51) or some of the cards (Br. 52-59) is patently without merit. The Company attacks 19 cards and since the Union's majority would remain intact if 58 of the 68 cards are valid, the Company must show that at least 10 were rendered invalid. However, many of the employees whose cards are attacked voluntarily attended one or more union meetings and thus were obviously much more interested in the union than an employee, who, for example, may have

signed in the plant but never attended any meetings.²³ Moreover, in several cases (Polony, Christenson, Virgil), the testimony shows that statements about an election were made by unidentified persons or were the source of rumor in the plant (Tr. 1373-1374, 380-381, 1465), neither of which can be attributable to the Union so as to invalidate the cards. See *Matthews v. N.L.R.B.*, *supra*, 354 F.2d at 437-438; *Furr's, Inc. v. N.L.R.B.*, *supra*, 381 F.2d at 568, n. 14.

In any event, the evidence cited by the Company does not show that the Union represented that the cards were only for an election and not for authorization. It must be pointed out that the employees read the authorization cards or had them explained and that none of the employees asked the Union or its solicitors for the return of their cards after the recognition request.²⁴ In some cases (Booze, Cisneros, Cuda, Dellomes, Garger, Kofink, Lawrence, and Weymar) the cards were signed at the union meeting where Sloane properly explained the use of the cards (*supra*, p. 40). In others (Knowles, Homnan, and Virgil) the testimony indicates that the solicitor mentioned that the cards could be used for recognition, as well as an election—a truthful statement of the law.²⁵ As to other

²³The Charging Party's Exhibit No. 2 lists some of these employees as having attended the March 14 meeting, *after* they signed their cards.

²⁴Contrary to the Company's brief (Br. 52, 55, 57, 58), the testimony of employees Proudfoot (Tr. 486), Dellomes (Tr. 1364-1366), Lawrence (Tr. 1483-1484), and Rhedin (Tr. 1450) shows that they did indeed read their cards before signing.

²⁵Employee Knowles testified that he was told by the employee who solicited him that "he wanted to unionize the tool and die industry in Southern California and I told him I would . . . [and] as near as I can remember, we wanted an election for union representation" (Tr. 423). Employee Virgil testified that the person who gave him his card that it could be used "for either an election or . . . allowing the Union to come in" (Tr. 383). Employee Homnan, who was given a card by Anathaiwongs (*supra*, p. 33) testified he was not told of any election but simply that the card would allow "the Union [to] come in" (Tr. 499).

cards (Cheetham, Kuhmann, Proudfoot, Cuda, Vogl), the Company cites no evidence that solicitors made any representations to the employees whatsoever.²⁶

In view of the above, and his opportunity to pass on the demeanor of the witnesses, the Examiner properly discredited any testimony which might suggest that Union agents told employees that the only purpose of the cards was for an election (R. 29). See, *Matthews v. N.L.R.B.*, *supra*, 354 F.2d at 436-438; *N.L.R.B. v. Security Plating*, *supra*, 356 F.2d at 726-727; *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 702 (C.A. 2).²⁷

Although the Company concedes that a showing of misrepresentation must be based upon "what was said" to employees (Br. 29), it is signifi-

²⁶This leaves the cards of three employees (Garrett, Rhedin, and Christenson) concerning which there was testimony that the employees were told by an identified solicitor that the cards would be used to obtain an election. But the testimony does not show that they were told that the cards did not authorize bargaining, as stated on the cards or that the only purpose of the cards was for an election. See, *Bryant Chucking Grinder v. N.L.R.B.*, *supra*, 389 F.2d at 568. For example, although Christenson testified on direct that he was told the cards would be used for an election, on cross-examination, he attributed those statements to "conversation . . . in the shop" (Tr. 1465). Garrett testified that the person who solicited him told him to do "what I thought was right" (Tr. 1420) and he signed the card in the "privacy of [his] home" after reading it (Tr. 1423). Rhedin could not recall all of what the solicitor told him (Tr. 1452), but he too signed his card in private—at the noon break (Tr. 1453). See *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 702 (C.A. 2). Finally, even assuming that these three cards were invalid, they did not affect the Union's majority (*id.* at 703).

²⁷Also rejected was testimony cited by the Company (Br. 48-49) as to the solicitation of four other employees (Hunt, Mancini, Mansfield, and Mellone). These employees did not sign cards counted by the Board towards the Union's majority. Indeed Hunt testified he was told that the purpose of the cards was "getting a union in the shop" (Tr. 1475). Mansfield's testimony referred only to unidentified rumors of an election (Tr. 627).

cant that the Company relies upon testimony which reflects the subjective intent of card signers—over a year after the cards were signed, after an election campaign and after the employees had been subjected to coercive employer action. Such testimony is ordinarily not admissible, and may not be used to vitiate clear authorizations. For “an employee’s thoughts (or afterthoughts) as to why he signed a union card and what he thought the card meant cannot negative the overt action of having signed a card designating a union as bargaining agent.” *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732, 743 (C.A. D.C.), cert. denied, 341 U.S. 914.²⁸ Testimony of this sort, even if it refers to what solicitors allegedly told employees, is suspect not only because of the passage of time but because an employer’s unfair labor practices may have had their intended effect, namely, a change of heart by the card signers.²⁹ As the District of Columbia Circuit recently observed:

. . . we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee’s original support for the union also altered that employee’s memory as to

²⁸See also, *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678; *N.L.R.B. v. Geigy Co.*, *supra*, 211 F.2d at 556; *Matthews v. N.L.R.B.*, *supra*; *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (C.A. 2); *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920 (C.A. 6); *N.L.R.B. v. Gordon Mfg. Co.*, *supra*, ___ F.2d at ___, 68 LRRM at 2458; *N.L.R.B. v. Gorbea, Perez & Morell*, 300 F.2d 886, 887 (C.A. 1). But see, *N.L.R.B. v. Southland Paint Co.*, 68 LRRM 2169 (C.A. 5); *Crawford Mfg. Co. v. N.L.R.B.*, *supra*, 386 F.2d 367.

²⁹See *N.L.R.B. v. Bradford Dyeing Ass’n*, 310 U.S. 318, 339-340; *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678, 687; *N.L.R.B. v. Geigy Co.*, *supra* at 556; *N.L.R.B. v. Quality Markets, Inc.*, 387 F.2d 20, 23 (C.A. 3); cf. *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 705.

events which occurred before the presentation of such threats and benefits.

United Automobile Workers (Preston Products Co., Inc.) v. N.L.R.B., *supra*, 392 F.2d at 807-808. Accord: *N.L.R.B. v. Southbridge Sheet Metal Works*, *supra*, 380 F.2d at 855 (C.A. 1). See also, *N.L.R.B. v. Sunshine Mining Co.*, 110 F.2d 780, 790 (C.A. 9), cert. denied, 312 U.S. 678.

This rationale is particularly applicable here because the Company apparently undertook to induce favorable testimony as to the card signings just 2 or 3 weeks before the hearing. On April 5, 1966, the Company sent letters to all employees denouncing the anticipated use of the authorization cards at the Board hearing and stating, contrary to the law (*supra*, p. 35), that the "only true way" of determining union representation was by a Board election (G.C. 23, Tr. 973). The Company also enclosed a questionnaire, asking employees to indicate which of several reasons was the "true reason" they signed cards. None of the listed reasons was the one stated on the card—union authorization for bargaining (G.C. 23, Tr. 538-539, 510, 487, 641-642). On April 12, 1966, the Company sent another letter to employees, stating that the responses indicated that most employees did not even sign cards and those who did, did not intend to give the Union authorization to bargain, that they "were told that . . . the purpose of the cards" was to have an election (G.C. 24). Vice-President Fink, who sent the letter, admitted he had no knowledge of the truth of these representations (Tr. 978, 984-985, 973, 981). The letter also stated that the card signers would be questioned at the hearing as to "whether you were told by the Union . . . that the purpose was to have an election" (G.C. 24). In addition, Personnel Manager Berno approached several employees shortly before the hearing and questioned

them as to why they had signed cards (Tr. 367-370, 532-536, 639-642). Berno prepared a statement for employee Virgil to sign stating that he had signed a card “under pressure or a strain of some type”—which was clearly incorrect (Tr. 370). Another employee who “changed his mind” on the Union signed a statement, prepared by Berno, in Berno’s office the night before he testified at the hearing (Tr. 532-533, 536). Such action by the Company, although not found to be a violation of the Act, undoubtedly affected the testimony of employees concerning the cards. It is the very same type of conduct which was condemned long ago by the District of Columbia Circuit in *Joy Silk Mills v. N.L.R.B.*, *supra*, 185 F.2d at 743.

In these circumstances, the Board was not required to place reliance upon any evidence suggesting that employees had second thoughts about their actions in signing plain authorization cards. As the Examiner pointed out (R. 29), these were intelligent employees who knew what they were signing and, as we have shown, there was no *competent* evidence that the cards were signed because of union misrepresentations of purpose which would vitiate the cards. The Company’s solicitude for “employees’ rights” in its brief to this Court (Br. 7) must sound hollow indeed to the employees who were subjected to the Company’s misconduct. As Judge Sobeloff has stated, “‘Crocodile tears’ shed by an employer over the loss of his employees’ free and untrammelled choice after he has violated either Section 8(a)(1) or (3) or both should not impress us.” *N.L.R.B. v. Sehon Stevenson & Co.*, 386 F.2d 551, 557 (C.A. 4) (concurring opinion). “By the time of the hearing the employees may well have changed their mind with respect to union affiliation, but the crucial question . . . is whether the union had the support of a majority of the employees . . . at the time the [bargaining] request was made, and not whether that support remains intact some

ten months later.” *United Automobile Workers v. N.L.R.B.*, *supra*, 392 F.2d at 808.³⁰

**B. The Company’s refusal was not motivated by a
good-faith doubt of the Union’s majority**

It is settled that, while an employer may properly refuse to bargain with a union if it doubts in good faith that the union has the support of a majority of the employees, the alleged doubt must not only be based on reasonable grounds but it must be the real reason for the employer’s refusal to recognize the union. *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 847 (C.A. 9). Accord: *N.L.R.B. v. Austin Powder Co.*, 350 F.2d 973, 977 (C.A. 6); *N.L.R.B. v. Quality Markets*, 387 F.2d 20, 23-24 (C.A. 3); *Joy Silk Mills v. N.L.R.B.*, *supra*, 185 F.2d at 741-742 (C.A. D.C.). Here, as we show below, substantial evidence supports the Board’s conclusion that the Company’s refusal was not based on a good-faith doubt of the Union’s majority but rather on a “desire to forestall collective bargaining and provide an opportunity to undermine the union’s majority status and rid the Company of the union.” *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 727.

As shown in the Counterstatement (*supra*, p. 9), the Company’s response to the Union’s demand indicated it had no knowledge concerning the circumstances under which the Union’s cards “may have been ob-

³⁰ Nor are the cards of foreign-born or foreign-speaking employees invalid as such (Br. 65). *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 726-727 (C.A. 9). Here, as in *Security Plating*, the employees either read the cards or had them explained (Tr. 502, 562, 486, 552, 514, 497). All of the employees testified in English and most had been in this country for some time.

ained.” Yet, the Company refused to bargain and also refused the Union’s offer of a card check by an impartial third party. The Company thus “chose not to learn the facts [and] it ‘took the chance of what they might be.’” *Matthews v. N.L.R.B.*, *supra*, 354 F.2d at 439, quoting from *N.L.R.B. v. Elliott-Williams Co.*, 345 F.2d 460 (C.A. 7). The Board could properly find such evidence “inconsistent with the assertion of good faith” *N.L.R.B. v. Ralph Printing & Lithographing Co.*, *supra*, 379 F.2d at 693.³¹

Also inconsistent with good faith was the Company’s pervasive unlawful activity which reveals a determination not to accept union representation under any circumstances. As the Board found (R. 30), the Company “saw the Union as a threat to its way of dealing with its employees” and refused to accept “the thought that the employees might desire to have Union representation.” As soon as it learned the Union was making headway in organizing its employees the Company sought to undermine it by granting wage increases and forming its own grievance committee so that problems could be solved “among ourselves” (Tr. 36). After it received word of the Union’s majority it “continu[ed] to deal with the management dominated committee” (*N.L.R.B. v. H & H Plastics Mfg. Co.*, *supra*, 389 F.2d 678, 683) and later discharged two leading union advocates. The Company also raised fears of economic reprisal if the Union won the

³¹Of course, where an employer has tangible evidence of widespread card improprieties and has communicated this to the Union, the Company’s refusal to participate in a card check may not carry adverse connotations. Cf. *N.L.R.B. v. Logan Packing Co.*, 386 F.2d 562, 565 (C.A. 4) (*dictum*), relied on by the Company (Br. 24-26). But where, as here, the objective evidence indicates no rational basis for doubting the Union’s majority, the refusal to participate in a card check is telling evidence of the Company’s motivation, unaffected by subsequent investigation and arguments of counsel. See, *N.L.R.B. v. Sehon Stevenson & Co.*, *supra*, 386 F.2d at 554-556 (concurring opinion of Judge Sobeloff); *Snow v. N.L.R.B.*, *supra*, 308 F.2d at 692.

election and made reckless and unsubstantiated representations that three companies in the area had closed down because of the Union (*supra*, p. 21). On the basis of this pattern of unlawful conduct, the Board, as this and other courts have held, could reasonably conclude that the Company's refusal to recognize the Union stemmed not from a good faith doubt of its majority status but from a total rejection of the principle of collective bargaining. *N.L.R.B. v. Security Plating Co.*, *supra*, 356 F.2d at 727 (C.A. 9). See also, *N.L.R.B. v. Luisi Truck Lines*, *supra*, 384 F.2d at 847; *N.L.R.B. v. Geigy Co.*, *supra*, 211 F.2d at 556; *Matthews v. N.L.R.B.*, *supra*, 354 F.2d at 439; *Joy Silk Mills v. N.L.R.B.*, *supra*, 185 F.2d at 741-742; *N.L.R.B. v. Quality Markets, Inc.*, *supra*, 387 F.2d at 23-26 (C.A. 3); *N.L.R.B. v. H & H Plastics Mfg. Co.*, *supra*, 389 F.2d at 683-684; *N.L.R.B. v. Goodyear Tire & Rubber Co.*, *supra*, 68 LRRM at 2138; *N.L.R.B. v. Big Ben Department Stores, Inc.*, F.2d , 68 LRRM 2311, 2314 (C.A. 2); *N.L.R.B. v. Atco Surgical Supports, Inc.*, *supra*, 68 LRRM at 2201.³²

³²The cases cited by the Company at pp. 68-69 of its brief are not to the contrary and are distinguishable on their facts. In *N.L.R.B. v. Johnnie's Poultry Co.*, 344 F.2d 617 (C.A. 8), and *N.L.R.B. v. Morris Novelty Co.*, 378 F.2d 1000 (C.A. 8) there were no unfair labor practices at the time of organizational activity. Compare the Eighth Circuit case of *N.L.R.B. v. Ralph Printing Co.*, *supra*, 379 F.2d 687, 693. In *Lane Drug Co. v. N.L.R.B.*, 391 F.2d 812 (C.A. 6) the Union's demand was not clear and the employer had had prior experience with an unsuccessful claim by the same Union; in *Peoples Service Drug Stores, Inc. v. N.L.R.B.*, 375 F.2d 551 (C.A. 6) the only unfair labor practices were coercive statements from minor supervisors not authorized by "top management"; and in *N.L.R.B. v. Shelby Mfg. Co.*, 390 F.2d 595 (C.A. 6), the cards used by the Union to present its majority claim were ambiguous on their face and could not support a bargaining order. Compare the recent Sixth Circuit cases of *N.L.R.B. v. H & H Plastics*, *supra*; *N.L.R.B. v. Atco Surgical Supports, Inc.*, *supra*, and *Atlas Engine Works, Inc. v. N.L.R.B.*, *supra*, where unfair labor practices similar though much less pervasive than here were held properly to support a finding of an absence of good faith doubt. In *N.L.R.B. v. Flomatic Corp.*, 347 F.2d 74 (C.A. 2), there was an improper bargaining demand made by the Union and minimal unfair labor practices; and *Textile Workers Union v. N.L.R.B. (J.P. Stevens)*, 380 F.2d 292 (C.A. 2), cert. de-

Contrary to the Company's contention (Br. 76) the Trial Examiner and the Board did reject testimony indicating that the Company had a good faith doubt of majority. As the Examiner stated, "I find that the respondent at no time took an introspective view to discover whether it had a good faith doubt or a doubt of any sort concerning the majority status of the Union" (R. 30). This determination is, of course, supported by the Company's misconduct, discussed above, which speaks more objectively than its words. It is also significant that the alleged discussion between Fink and Howland analyzing employee sentiment on the Union was held the night before receipt of the Union's demand in circumstances which cannot be contradicted by direct evidence. Such testimony is thus of little value in resolving the issue of motivation. See, *N.L.R.B. v. Laars Engineers, Inc.*, *supra*, 332 F.2d at 667. In any event, the testimony does not establish that the Company had a good faith doubt of the Union's majority or that its refusal to bargain was based on such doubts. The Company admittedly had no knowledge at this time of anything which would impugn the Union's card majority. See *N.L.R.B. v. H & H Plastics Mfg. Co.*, *supra*, 389 F.2d at 678. ^{thus} Fink and Howland had no evidence at the time of their discussion that the Union overreached in obtaining cards: they did not discuss "who signed a card or didn't sign a card" (Tr. 926).

ried, 389 U.S. 1005, did not involve Section 8(a)(5) of the Act at all. In *N.L.R.B. v. River Togs, Inc.*, 382 F.2d 198 (C.A. 2), the unfair labor practices were minimal—three coercive statements. Compare the Second Circuit's decisions in *N.L.R.B. v. Consolidated Rendering Co.*, *supra*; *Bryant Chucking Grinder Co.*, *supra*, and *N.L.R.B. v. Big Ben Department Stores, Inc.*, *supra*. Judge Friendly, who authored *River Togs*, recognizes that the commission of unfair labor practices bears on whether an employer's doubts as to the Union's majority provides a "substantial reason for [his] refusal to recognize the union rather than simply an excuse later manufactured for a position he would have taken in any event. . . ." *N.L.R.B. v. United Mineral & Chem. Corp.*, 391 F.2d 829, 838 (C.A. 2).

Moreover, the Company's alleged assessment of union strength was rather imprecisely measured by its own illegal questioning of employees; the responses were undoubtedly affected by the coercive interrogations. Naturally, the Company's unlawful activities may have shaken or diluted the Union's majority support. But, in view of its misconduct, the Company may not rely on manufactured doubts "based on . . . [the] knowledge that its illegal tactics had been at least partially successful." *N.L.R.B. v. Quality Markets, Inc.*, *supra*, 387 F.2d at 24. Accord: *N.L.R.B. v. Geigy Co.*, *supra*, 211 F.2d at 556.³³

C. The Board's bargaining order was a proper remedy

In the circumstances of this case, the Board reasonably ordered the Company to bargain with the Union upon request. As shown above (*supra*, pp. 31-32), a bargaining order is the usual remedy for the violation of Section 8(a)(5) even though the Union has lost an election subsequently held to be invalid. In the instant case, the Board necessarily set aside the election because of the Company's pre-election misconduct, an action not questioned by the Company here. The Company's unfair labor practices manifestly interfered with the free choice of employees. In these circumstances, it was within the Board's remedial discretion to conclude that the Company's interferences with employee rights could best be remedied by a bargaining order rather than the holding of a second election. *N.L.R.B. v. Luisi*, *supra*, 384 F.2d at 847-848. Requiring a second election and the posting of a notice would hardly dissipate the effects of the Company's

³³Nor does the Company advance its case by contending that its refusal to bargain was made on the advice of counsel (Br. 79). Company counsel Gould did not testify in this case. The only evidence that cards were discussed at this time was that Fink told Gould that he *heard* that one employee signed to be put on a mailing list (Tr. 886-887), and that Howland had "information that one or two employees had signed cards for other reasons than to be represented" (Tr. 1175). Fink admitted there

action. On the other hand a bargaining order vindicates the rights of employees, a majority of whom had effectively selected the Union as their bargaining agent. It also blunts the possibility that an employer may profit from his unlawful subversion of the election process. Indeed, where, as here, the Union loses its majority status as a result of the employer's unfair labor practices, many courts have found a bargaining order appropriate even where there has been no technical refusal to bargain. See, *Wausau Steel Corp. v. N.L.R.B.*, *supra*, 377 F.2d at 372-374; *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F.2d 575, 591-592 (C.A. 3), cert. denied, 364 U.S. 933; *Editorial "El Imparcial", Inc. v. N.L.R.B.*, 278 F.2d 184, 187 (C.A. 1); *United Steelworkers of America (Northwest Engineering Co.) v. N.L.R.B.*, 376 F.2d 770, 772-773 (C.A.D.C.), cert. denied, 389 U.S. 932; *Local No. 152, Teamsters Union v. N.L.R.B.*, 343 F.2d 307, 309 (C.A.D.C.); *N.L.R.B. v. Delight Bakery, Inc.*, 353 F.2d 344, 347 (C.A. 6); *D.H. Holmes Co. v. N.L.R.B.*, 179 F.2d 876, 879-880 (C.A. 5); *N.L.R.B. v. Caldarera*, 209 F.2d 265, 268-269 (C.A. 8); *J.C. Penney Co. v. N.L.R.B.*, 384 F.2d 479, 486 (C.A. 10).

was no detailed discussion of individuals (Tr. 889); and the Company did not contact the Union about a card check. In these circumstances, the Company's evidence falls far short of establishing a good faith doubt of majority in a unit of 114 employees. See *N.L.R.B. v. H & H Plastics*, *supra*, 389 F.2d at 683.

CONCLUSION

For the reasons stated, the petition to review should be denied and the Board's order should be enforced in full.

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July 1968.

APPENDIX

In addition to the statutory appendix in the Company's brief, we consider the following provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs 151, *et seq.*) to be relevant:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

REPRESENTATIVES AND ELECTIONS

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the

rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reason-

able cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decisions shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such

person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

No. 22538

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MECHANICAL SPECIALTIES COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the
National Labor Relations Board.

BRIEF OF PETITIONER.

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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Order of the
National Labor Relations Board.

BRIEF OF PETITIONER.

Jurisdictional Statement.

This case is before this Court by way of a petition praying that a Decision and Order of the National Labor Relations Board (reported at 166 NLRB No. 31) be reviewed and set aside. The Board has filed a cross-petition for enforcement of its Order. Petitioner is engaged in business in this judicial circuit, in the State of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioner is aggrieved by such final Order of the Respondent and, therefore, this Court has jurisdiction under §10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 27 U.S.C. §141 *et seq.* (1958)] (The pertinent statutory provisions are reprinted, *infra*, at Appendix D.) The Respondent, in its answer and cross petition, has admitted Petitioner's jurisdictional allegations.

I.

STATEMENT OF THE CASE.

Mechanical Specialties Company, the Petitioner, located in the Metropolitan Los Angeles area, is engaged in business in the manufacture of tools, gauges, special machines, missile components and nuclear components for its customers. It has been in business for the past 30 years and employs about one hundred and fifty employees. On March 16, 1965, Petitioner received a demand letter from the United Auto Workers Union stating that it represented a majority of Petitioner's employees and requesting that collective bargaining negotiations be commenced. By letter of March 19, 1965, Petitioner responded stating, among other things, that it doubted in good faith the Union's claim to majority status and rejected the demand.

On March 22, 1965, the union filed a representation petition with Region 31 of the NLRB seeking a union

election in the plant [G.C. Ex. 1(a); R. T. 5].* After a representation hearing was held to determine questions of unit scope and employee eligibility, Respondent directed an election [G.C. Ex. 1(b)(c); R. T. 5]. The results of that election, held June 11, 1965, show a decisive rejection of the union—59 to 40 [G.C. Ex. 1(d)].

Thereafter the union filed objections to the election and first amended unfair labor practice charges which alleged violations of Section 8(a)(1)(2)(3) and (5) of the Act [G.C. Ex. 1(f), (h)].

The Respondent's Regional Director then issued a complaint and consolidated for hearing the objections and unfair labor practice charges [G.C. Ex. 1 (j), (1)]. The hearing took place from April 25 to May 26, 1966 before an NLRB Trial Examiner. On February 23, 1967, the Trial Examiner's Decision issued, finding that Petitioner had violated §8(a)(1) by engaging in coercive pre-election conduct, §8(a)(2) for having formed a grievance committee, §8(a)(3) for having terminated employees Klein and Cantrell, and §8(a)(5) for having refused to bargain with the union in March 1965 upon its demand [C. T. 23-42]. Petitioner filed exceptions to that Decision with Respondent [C. T. 46-65]. On June 28, 1967, Respondent's Decision and Order issued upholding its Trial Examiner in all material respects [C. T. 66-69]. The employer's Petition for Review by this Court followed on January 11, 1968, asking that the Respondent's Order be set aside in its entirety [C. T. 70-81].

*References to the stenographic transcript of the consolidated hearing are preceded by the designation "R. T." and citation is made to the appropriate transcript page number. References to the documents reproduced in "Transcript of Record, Vol. I" are preceded by the designation "C. T." and citation is made to the appropriate page number. References to all undesignated exhibits are made by citation to the appropriate exhibit number.

II.

SPECIFICATION OF ERRORS RELIED UPON.

The Respondent erred in the following respects:

1. In concluding and holding that the Union, on March 12, 1965 and at all times material herein, had been freely designated as bargaining representative by a majority of Petitioner's employees in an appropriate unit.

2. In concluding and holding that Petitioner did not have a good faith doubt that the Union represented a majority of its employees at the time of the Union's demand for recognition.

3. In concluding and holding that Petitioner had unlawfully refused to bargain with the Union within the meaning of §8(a)(5) of the Act.

4. In concluding and holding that Petitioner violated §8(a)(1) by questioning employees in a context of threatened plant closure and by granting a wage increase.

5. In concluding and holding that Petitioner violated §8(a)(2) by creating and using a grievance committee.

6. In concluding and holding that employees Cantrell and Klein were discharged by Petitioner in order to discourage activity on behalf of the Union in violation of §8(a)(3) of the Act.

III.

SUMMARY OF ARGUMENT.

In this brief, Petitioner will show:

A. The Union at no time was the freely selected collective bargaining representative of a majority of Petitioner's employees. On the contrary, the preponderance of evidence shows that Petitioner's employees were duped and misled into signing union authorization cards in the belief, induced by union representatives, that the cards would merely lead to an election. Respondent erroneously and prejudicially ignored or discounted all of this evidence.

B. That even, *arguendo*, if it could be held that a majority of Petitioner's employees had freely and intentionally designated the Union as its collective bargaining agent, nonetheless, at the time the Union made its demand upon Petitioner, the Petitioner had a good faith doubt as to the Union's majority and therefore properly and by law rejected the Union's demand; that said good faith doubt was proven conclusively in the record but that Respondent erroneously and prejudicially ignored or discarded all of this evidence; and that even if it be found that Petitioner committed unfair labor practices, said activity did not and does not detract in any way from the proven good faith doubt as to the Union's majority held by Petitioner.

C. That the 8(a)(1), 8(a)(2) and 8(a)(3) findings by Respondent are unsupported in the record, erroneous and prejudicial to Petitioner and based not upon facts but upon its Trial Examiner's own unique philosophy of how Petitioner should run its plant and how the Act should be interpreted; and, at any rate, assuming the commission of any unfair labor practice, such activity does not justify or permit the remedy urged by Respondent.

IV.
ARGUMENT.

PART 1.

THE UNION'S ALLEGED MAJORITY AND THE
PETITIONER'S GOOD FAITH DOUBT: THE AS-
SERTED 8(a)(5) VIOLATION.

Preliminary Statement.

The principal issues involved in this case center around the application of the doctrine advanced in the *Bernel Foam* case, 146 NLRB 1277 (1964), which would require Petitioner to recognize and bargain with the Union, notwithstanding the Union was decisively rejected by the great majority of Petitioner's employees in an NLRB election. The Respondent Board affirmed its Trial Examiner's strictest possible application of that doctrine against the overwhelming weight of evidence and, Petitioner submits, contrary to the emphatically expressed desire, *at all times*, of those most affected—the employees. The Trial Examiner's and Respondent's instant decisions have been routinely advanced by them notwithstanding the near universal position of the courts that *Bernel Foam* (as even its proponents would admit) is a harsh "remedy" and should not be applied *pro forma* but should be resorted to only in the most telling situations.¹

¹Petitioner herein does not attack the *Bernel Foam* doctrine but rather its application in the premises. The doctrine, but more particularly its application by the Board in numerous cases has been strongly attacked by scholarly reviews. See an excellent Note entitled "Union Authorization Cards" in 75 *Yale Law Journal* 804 (1966). See also Lesnick "Establishment of Bargaining Rights without an NLRB Election", 65 *Mich. L. Rev.* 851 (1967); "Refusal-To-Recognize Charges under Section 8-(a)(5) of the NLRA: Card Checks and Employee Free Choice" 33 *U. Chic. L. Rev.* 387 (1967). While some courts and writers have supported the theory of *Bernel Foam*, the Board's application of that doctrine in numerous instances has scarcely been defended and has been under attack by both authorities in the field and the Circuit Courts, as will be indicated *infra*.

Indeed, since this case arose and was heard, most federal Circuit Courts have been confronted with situations wherein the Board urged that its *Bernel Foam* 8(a)(5) holding be upheld. And in all cases involving similar facts as those existing in the instant litigation, at least eight Circuits have clearly but emphatically rejected the Draconian positions urged by Respondent.

In regard to the question as to whether, in the first instance, the Union properly obtained a majority of authorization cards, so as to permit even *consideration* of a *Bernel Foam* remedy, at least seven Circuit Courts have in numerous cases denounced the very same position that the Board advances in this case.²

As to the second issue, whether Petitioner held a good faith doubt as to the Union's majority, assuming, *arguendo*, the existence of a majority, at least five

²Second Circuit: *NLRB v. S. E. Nichols Company*, 380 F. 2d 438 (1967); *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (1967); *NLRB v. Golub Corporation*, 388 F. 2d 921 (1967).

Fourth Circuit: *Filler Products, Inc. v. NLRB*, 376 F. 2d 369 (1967); *Crawford Manufacturing Co., Inc. v. NLRB*, 386 F. 2d 367 (1967), *cert. den.*, U.S.; *NLRB v. S. S. Logan Packing Company*, 386 F. 2d 562 (1967).

Fifth Circuit: *Engineers & Fabricators, Inc. v. NLRB*, 376 F. 2d 482 (1967); *NLRB v. Lake Butler*, F. 2d (1968).

Sixth Circuit: *Dayco Corporation v. NLRB*, 382 F. 2d 577 (1967); *NLRB v. Swan Super Cleaners, Inc.*, 384 F. 2d 609 (1967); *NLRB v. Shelby Manufacturing Company*, 390 F. 2d 595 (1968).

Seventh Circuit: *NLRB v. Dan Howard Manufacturing Co.*, 390 F. 2d 304 (1968).

Eighth Circuit: *Bauer Welding and Metal Fabricators, Inc. v. NLRB*, 358 F. 2d 766 (1966).

Tenth Circuit: *NLRB v. Midwestern Manufacturing Co., Inc.*, 388 F. 2d 251 (1968).

And see also *NLRB v. Freeport Marble & Tile Co., Inc.*, 367 F. 2d 371 (1st Cir., 1966).

Circuits, including this Court, in a number of cases have spurned the unrealistic position of Respondent.³

The foregoing overwhelming case authority should be decisive of the instant action; indeed, the absence of a true majority in support of the Union and the patent existence of a good faith doubt on the part of Petitioner are even more emphatic in light of the record in the instant case than was the situation in any of the foregoing cases wherein Respondent's positions were rejected.

The most salient point in this case, and one which the Trial Examiner and Board recognized only in theory, is that it is *employees' rights we are expounding*. Whatever the alleged "sins" of Petitioner may be, unless they clearly had the effect of dissipating an established majority for the Union, to apply the Bernel Foam "remedy" would make the 1947 legislation a mockery of individual rights. Better to fine or punish the sinner (if he be such) than to "remedy" the situation by "punishing" the employees. And if Respondent does not have the authority to fine or punish Pe-

³Second Circuit: *NLRB v. Flomatic Corporation*, 347 F. 2d 74 (1965); *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (1967); *Textile Workers Union v. NLRB*, 380 F. 2d 292 (1967).

Sixth Circuit: *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F. 2d 551 (1967); *NLRB v. Shelby Manufacturing Company*, 390 F. 2d 595 (1968); *Lane Drug Co. v. NLRB*, F. 2d (1968).

Seventh Circuit: *Wausau Steel Corp. v. NLRB*, 377 F. 2d 369 (1967).

Eighth Circuit: *NLRB v. Johnnie's Poultry Co.*, 344 F. 2d 617 (1965); *NLRB v. Morris Novelty Co.*, 378 F. 2d 1000 (1967); *NLRB v. Arkansas Grain Corp.*, F. 2d (1968).

Ninth Circuit: *Don The Beachcomber v. NLRB*, 390 F. 2d 344 (1968).

titioner—assuming that such is even proper—then it should go to Congress to seek such authority; it should not macerate the rights of employees to teach employers.

The final critical test here is did the Union at the crucial period of time in question truly represent the majority of the employees of Petitioner. And, assuming, *arguendo*, that this could possibly be answered in the affirmative, can it be said that the General Counsel has borne the burden of proof of showing that the Employer did not entertain a good faith doubt as to the Union's representative authority? If, as we contend and as we trust the record supports, either the Union did not represent a majority of the employees or the Petitioner did have a good faith doubt as to the existence of a union majority in an appropriate unit, then an 8(a)(5) finding cannot be supported either in law, logic or on the record.

A. The Union's Alleged Majority: Fraud Run Rampant.

Clearly, for Respondent to travel successfully the long road leading to a Bernal Foam "remedy," it must first begin by proving that the Union, at the time it made its demand upon Petitioner, had been selected by a majority of Petitioner's eligible employees within an appropriate unit for the purpose of representing those employees in collective bargaining. The Board's General Counsel has failed to meet the burden of proof incumbent upon him in the premises. The evidence shows that there has never been, at any time pertinent to these proceedings, a majority of the employees of

Petitioner who have freely, and without misrepresentation, designated the Union as its collective bargaining agent.

The General Counsel introduced its Exhibit No. 101, which the parties stipulated to as being "the list of employees to be considered as the appropriate unit at the time of the demand which was March 12 continuing through March 16 (1965)," excluding certain employees and leaving the status of three and later only one employee in doubt [R. T. 717-720]. An examination of that exhibit shows there to be 114 employees within the unit at the time of the demand. Of this number, only the status of one individual at the end of the hearing was in issue.⁴ Thus, it was necessary for the General Counsel to show that 57 or 58 employees validly and freely designated the Union as their collective bargaining agent.

In an effort to meet his burden of proof, the General Counsel introduced Union authorization cards of various employees. The authenticity of approximately half of these cards was evidenced not by the individuals who purportedly signed these cards but by handwriting expert testimony. *In toto*, 68 authorization cards, which the Union allegedly possessed as of the time Petitioner received its demand, were introduced in evidence and the authenticity (as distinguished from the validity) of most, but not all, of these cards was supported either by testimony of the General Counsel's

⁴The record is unclear as to whether Zadnik during this time possessed the requisite indices of a supervisor.

expert or evidence of other witnesses, including some of the purported signators of these cards.⁵

The authenticity of *at least* three of the cards clearly lacked in the record the verification necessary to allow their acceptance as evidence supporting the Union's alleged majority and, in these cases, the cards may not be used for that purpose. The General Counsel failed to bear his burden of proof in regard to

⁵The following are the applicable cards admitted into evidence:

G.C.	G.C.
1. #25 Cantrell	35. #67 Howard
2. #28 I. Klien	36. #68 Hughes
3. #29 Rawl	37. #69 Johnson
4. #30 Ahlstrom	38. #70 Kastendick
5. #31 Knowles	39. #71 T. Klein
6. #33 Burke	40. #72 Kofink
7. #34 Proudfoot	41. #73 Kuhmann
8. #40 Amphor	42. #74 Lamb
9. #41 Anothaiwongs	43. #75 Lawrence
10. #42 Bertram	44. #76 Meier
11. #43 Booze	45. #77 Morrow
12. #44 Cheetham	46. #78 G. Neumann
13. #45 Christenson	47. #79 K. Neumann
14. #46 Christopher	48. #80 O'Kane
15. #47 Cisneros	49. #81 Osdale
16. #48 Congrove	50. #82 Patterson
17. #49 Conner	51. #83 Polony
18. #50 A. Crandall	52. #84 Rhedin
19. #51 D. Crandall	53. #85 Schlapp
20. #52 Cuda	54. #86 Scoggins
21. #53 Dellomes	55. #87 Seymour
22. #54 Dodd	56. #88 Smith
23. #55 Doebler	57. #89 Tieman
24. #56 Dufek	58. #90 Thiekotter
25. #57 Estrada	59. #91 Virgil
26. #58 Garger	60. #92 Voegeli
27. #59 Garrett	61. #93 Vogel
28. #60 Gedminas	62. #94 Welch
29. #61 Gumm	63. #95 Rbt. Weymar
30. #62 Haeler	64. #96 Rolf Weymar
31. #63 Harrison	65. #97 J. B. Williams
32. #64 Hinsch	66. #98 Wilson
33. #65 Hoef	67. #99 Wright
34. #66 Homnan	68. #100 Zirbel

these three cards and the Trial Examiner and Board completely ignored any and all evidence pertaining to the authenticity of any of these three particular cards; indeed they did not even allude to them though they were clearly and continually raised.⁶

⁶(1) G.C. Ex. #41, purportedly signed and dated by Niyom Anothaiwongs, a citizen of Thailand who was, at the time of the hearing, in Thailand [R. T. 1739-1740]. The General Counsel's handwriting expert testified that he had no opinion as to whether Anothaiwongs did, in fact, both sign and date G.C. #41 [R. T. 248, lines 4-5]. The General Counsel attempted to have this necessary information supplied by Anothaiwongs' fellow countryman and employee, Manit Homnan (Narathip). Homnan, himself, could scarcely read English and was extremely limited in his ability to speak the language. He, himself, did not make out his own card but Anothaiwongs purportedly did. Homnan testified on direct examination that he did not know whether Anothaiwongs signed his own card [R. T. 491, lines 17-19; 492, lines 3-4] and at one point stated that Anothaiwongs did not show it to him [R. T. 493, line 25, to 494, line 4]. Under these circumstances, there is no question that the card may not be included for the purpose of determining a majority. See *Indiana Rayon Corp.*, 151 NLRB 130, 1294 (1965); *Conso Fastener Corp.*, 120 NLRB 532 (1958). See also *NLRB v. River Togs, Inc.*, 382 F. 2d 198 (1967); *NLRB v. Midwestern Manufacturing Co., Inc.*, 388 F. 2d 251 (10 Cir., 1968).

(2) G.C. Ex. #55 was purportedly signed and dated by Dennis Doebler, who at the time of the hearing, was in the Army [R. T. 1739-1740]. The expert called by the General Counsel was not able to give an opinion as to whether G.C. #55 was both signed and dated by Doebler [R. T. 205, line 6; 250, line 4]. Subsequently, the General Counsel tried to establish the validity of this card through the testimony of Irving Klein. Klein testified that he gave Doebler a card but he did not know the exact date, adding, "practically the first two weeks of March." [R. T. 305, lines 1-8]. Klein did not testify as to when Doebler gave him the card back and he added that he paid no attention to the date on the card nor did he see him sign it [R. T. 307, line 6, to 308, line 8]. Also, there is no evidence whatsoever when Klein turned this card into the Union.

Since the record does not show when Doebler's card was signed, nor when Doebler dated it, nor if he dated it, nor whether it was handed to Doebler by Klein before or after the Union made its demand, nor when he returned it to Klein, nor when Klein turned it into the Union, it is abundantly clear that this card, too, may not be considered valid designation of the Union by Doebler

(This footnote is continued on the next page)

Moreover, the Trial Examiner unduly and prejudicially precluded Petitioner from properly examining the handwriting expert in order to impeach his authentication of authorization cards. The General Counsel called an expert, John J. Harris, who testified to the authenticity of signatures on numerous cards by comparing them with other documents which employees had signed, including W-4 forms, all admittedly genuine.

On cross-examination, counsel for Petitioner tried to have Harris compare certain authorization cards with other documents purportedly signed by employees about whose cards he had *not* testified [R. T. 255-256]. Some of these employees were later going to testify directly as to whether their card signatures were authentic. Counsel for Petitioner began by showing Harris an employee's W-4 withholding form for one Andy Ahlstrom, together with a group insurance application form and two checks purportedly signed by him. At this point, the general Counsel objected to counsel's questioning as being outside the scope of direct examination. The Trial Examiner erroneously sustained the objection [See R. T. 256-258].

at the time in question. See *Indiana Rayon Corp., Conso Fastener Corp., NLRB v. River Togs, Inc.* and *NLRB v. Midwestern Manufacturing Co., Inc., supra*.

(3) G.C. Ex. ± 76 was purportedly signed and dated by Anton Meier, who at the time of the hearing was in Oregon [R. T. 1739-1740]. The General Counsel's expert was unable to testify whether the person who signed G.C. ± 76 was the same person who filled in the date nor could he identify the person who did so [R. T. 225, line 18, to 226, line 13]. The expert called by Petitioner, however, stated emphatically that the date on G.C. ± 76 was not filled in by Meier nor by the person who signed that card [R. T. 1272, lines 6-25; 1273, line 22, to 1274, line 1; 1278, line 22, to 1279, line 5]. Obviously, the card may not be utilized for the purpose it was offered. See *Indiana Rayon Corp., Conso Fastener Corp., NLRB v. River Togs, Inc.*, and *NLRB v. Midwestern Manufacturing Co., Inc., supra*.

The Trial Examiner misconceived the proper scope of cross-examination of an expert witness when he limited that examination solely to signatures which had been verified on direct. It is a well-established rule of evidence that the cross-examination of an expert witness is not limited to the scope of his testimony on direct but that, in addition, an expert may be fully cross-examined as to the matter upon which his opinion is based and the reasons for his opinion. This, of course, includes showing an expert specimens on cross-examination of what has not been testified to on direct, in order to impeach his prior testimony. Obviously, if counsel had been allowed to continue this line of examination, and the expert had after comparison testified to the genuineness or invalidity of a signature on any document of one who later testified on the stand to the contrary, a wholly different light would have been thrown on *all* of the cards which the expert had previously verified.

In his treatise on evidence, Wigmore soundly condemns any prohibition on the use of this technique. Thus, he states:

“That the latter [use of documents whose genuineness is not already admitted to impeach an expert] is the better course seems clear. The reason is that the deprivation of this weapon for the cross-examiner is a loss so serious as to outweigh the inconveniences of its sanction. When, for example, the witness has sworn positively that the disputed signature is genuine, and then, on examining a new signature submitted to him, he declares with equal positiveness that it is a forgery and perhaps points out the (to him) unmistakable marks of difference, the testimony of a single unimpeachable witness that he saw the supposed

forgery written by the person bearing that name disposes at once of the trustworthiness of the first witness and the certainty of his conclusion. In many other similar ways a single test of this sort will serve to demolish the most solid fabric of handwriting testimony. There should be no limitations whatever on the power of employing these tests." (Wigmore on Evidence, 3 Ed. Vol. VII, p. 213)⁷

It is therefore, improper to sustain an objection to this line of questioning merely because it extends beyond the scope of direct examination.

Resolution of the question of majority status solely on the basis of cards is a questionable procedure at best. The situation becomes even more aggravated when the General Counsel attempts to prove the authenticity of cards, not by the direct, in-person testimony of those who purportedly signed them, but rather through the testimony of a handwriting expert. Certainly in this situation, counsel for Petitioner should be afforded the widest latitude in his attempts to impeach that expert by inducing him to affirm the genuineness of a false specimen or to deny the genuineness of an authentic specimen. This was precisely what the Trial Examiner's ruling precluded Petitioner from doing.

At any rate—and aside from the foregoing argument—there can be no question that the authenticity of

⁷Under the Act, Trial Examiners are bound to follow rules of evidence applicable in U. S. District Courts which, in turn, follow state rules of evidence. *Starlight Mfg. Co., et al.*, BNA, 64 Daily Labor Report, April 1, 1968. The new California Evidence Code, Section 721, is in accord with Wigmore.

The reason for the more liberal rule of cross-examination is made clear in *Hope v. Arrowhead & Puritas Waters, Inc.*, 74 Cal. App. 2d 222, 344 P. 2d 428 (1959). See also *People v. Tallman*, 27 Cal. App. 2d 209, 163 P. 2d 857 (1966).

G.C. Exs. 41, 55 and 76 has not been adequately supported by the General Counsel and, accordingly, *at the very least*, they may not be included for the purpose of determining the Union's alleged majority. Thus, at the most, there is in evidence the cards of only 65 employees that have been shown to be authentic and that may possibly be utilized for the purpose of attempting to establish that the Union had been designated by a majority of the employees at the time in question.

The next question—and one of critical and major significance—is the determination of how many of these 65 cards truly represented the voluntary designation of the Union as the collective bargaining agent of the signators and, conversely, how many of these cards must be rejected and declared invalid for this purpose because of false representations, important misleading statements and other expressions of deceit that caused various signators to sign the cards.

The Trial Examiner and Respondent *completely* ignored the voluminous evidence concerning these matters, including the uncontradicted testimony of not only Petitioner's witnesses but witnesses for the General Counsel clearly underscoring and supporting Petitioner's position. The Trial Examiner simply disallowed (more as a matter of personal conviction than on credibility) all the employee's testimony because, as he put it, the employees were "intelligent." Admittedly the employees are intelligent individuals and fine craftsmen. But most of them were totally unsophisticated concerning the field of labor-management relations. A large amount, if not the majority, are recent immigrants to this country, many of them can scarcely read English, a great proportion of them usually talk in one of many foreign languages, and virtually none of them had reason to disbelieve the Union when it made its

misrepresentations. To state, as the Trial Examiner did, that "One who preferred not to have a Union would probably prefer also not to have an election and would not sign a card" [C. T. 29, lines 11-40], is not only totally unsophisticated on the part of a layman, to say nothing of a Trial Examiner and Respondent, but defies the record in this case. Such a position exalts the authorization card, as such, to a position which is contrary to law, logic, reason and reality. If the consequences of such a position were not so tragic, it could be termed comical.

The record shows and this brief will discuss at length the innumerable falsities expounded by the Union, its agents, organizers and adherents as to the purpose and effect of the cards at the time they were being circulated and the *fact* that numerous signator-employees were duped as a result of the Union's culpable misrepresentations and executed cards as a direct consequence of these misrepresentations. As a result of what can only be labeled a deliberate attempt by the Union to deceive the employees as to the purpose and use of these cards, there was created during this critical period of time an almost universal belief shared by most employees that these cards were to be used to bring about an election. Whether the adverb "solely" or "only" or "merely" or "strictly" is applied, in the final analysis, numerous employees believed, based upon Union misrepresentations, that the card had one purpose: an election. There was created throughout the plant, therefore, by design on the part of the Union, a general atmosphere that these cards would bring about an election and that the employees could then register their views.

At the outset, we note that the utilization of cards to gain recognition without an election is fraught with

serious drawbacks and has received limited acceptance. Indeed, the Board itself has long recognized their unreliability. In *Sunbeam Corp.*, 99 NLRB 546, 550-51 (1952), the Board labeled cards a “notoriously unreliable method of determining majority status of a union. . . .”⁸

The gravamen of the instant dispute is that the Board has in recent times adopted a policy of accepting, at face value, the language of cards signed by employees as to their intention to designate the union as their bargaining representative unless, and only unless, union solicitors for these cards misrepresented their purpose by asserting that the cards were to be used “only” or “solely” for purposes of an election. This peculiar policy has been denounced by almost every Circuit Court in numerous cases in recent years and, indeed, it is in contravention of the Board’s earlier policy as

⁸And see 75 *Yale Law Journal* 804, 818-819 (1966) where it is stated:

“Authorization cards are an unreliable index of employee choice. Compared with the secret ballot they replace, their solicitation is a woefully defective process, guaranteeing to employees neither a free nor a reasoned choice. Their admitted inferiority to a properly conducted secret ballot should preclude their use absolutely when the employer has not committed an unfair labor practice interfering with employee free choice. And even when the employer does illegally interfere with free choice, authorization cards are so unreliable that a re-run election—or two or three or ten—better protects employee freedom. A causal relationship between employer misconduct and election results has never been proven, despite statistical and scientific case studies. It is as likely as not that a union loss, even when the employer has committed unfair labor practices in the campaign, accurately reflects employee wishes. Statistics on authorization cards, on the other hand, have corroborated their unreliability. It is ironic that the Board denies an election or re-run in order to protect employee free choice and then orders bargaining on the basis of cards which offer even less protection.”

established in *Englewood Lumber Company*, 130 NLRB 394 (1961), where Respondent stated:

“In these circumstances, considering only what the employees were told, and not what may or may not have been their subjective reaction to what they were told, we do not think it can reasonably be said that the employees, by their act of signing authorizations, thereby clearly manifested an intention to designate the Union as their bargaining representative.”

Respondent, however, in the instant case clearly adhered to its present but indefensible policy of accepting at face value cards when the magic words “only” or “solely” were not explicitly utilized by union solicitors in representing that the purpose of the cards was to have an election.

This “blind” approach to the validity of cards has been rejected by almost every Circuit Court confronted with the question. Each of them has pointedly and emphatically spurned the Trial Examiner’s critical conclusion in this case that “One who preferred not to have a Union would probably prefer also not to have an election and would not sign a card.” [C. T. 29, lines 11-40].

Recently, the Fifth Circuit in *Engineers & Fabricators, Inc. v. NLRB*, 376 F. 2d 482 (1967) met this same issue. According to that court, testimony before the Trial Examiner indicated that frequently employees’ signatures were obtained by telling them that the card was not for union membership but rather to obtain an NLRB election. As the court sees it, the Board relies on the rule that:

“. . . if such cards as these are solicited by a statement that they are to be used to get an election, but are later used to prove majority status,

there is no misrepresentation. According to the Board, it would require a statement that the cards were used *only* to get an election to constitute misrepresentation.”

Judge Coleman’s opinion for the court comments that the Fifth Circuit “has previously shown its impatience with such contentions.” The court further stated:

“The Board has the same burdens and obligations as any other litigant who takes the affirmative, and must prove its charge. *NLRB v. Riverside Mfg. Co.*, 5 Cir. 1941, 119 F. 2d 302. Therefore, the general counsel had the burden of showing that the cards authorized representation. . . .

“When cards are challenged because of alleged misrepresentations in their procurement, the general counsel must show that the subjective intent to authorize union representation was not vitiated by such representations. Here the Board did not apply this legal standard. Instead it contends that

‘. . . documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence of a showing of coercion in their procurement of representations that despite the purpose clear and expressly stated on the cards themselves the cards would be used only for a different more limited purpose. *Aero Corp.*, 149 NLRB No. 114, 57 LRRM at 1490.’

“This applies too lax a standard, and therefore the burden was not met. The point is that the Board applied the facts to the wrong legal standard because there was no probing into the subjective intent of the challenged signers.”

While there may be some difference of opinion as to whether subjective intent, *per se*, is a proper factor to take into consideration—a matter which we shall later discuss at length—there is no question (1) that the court in *Engineers & Fabricators* rejected the Board's policy outright and (2) recognized the essential requirement that all misrepresentations which lead to employees being duped into signing authorization cards are not only proper but necessary matters of inquiry. In the instant case, as will be pointed out below, it is not necessary (although probably proper) to delve into employees' subjective intent; it is surely necessary and proper, however, to analyze the nature of the misrepresentations which both Respondent and the Trial Examiner summarily ignored.

The Second Circuit was equally emphatic in rejecting the Respondent's cavalier treatment of union misrepresentations in these circumstances. In *NLRB v. S. E. Nichols Company*, 380 F. 2d 438 (2d Cir., 1967), the court was confronted with a similar, indeed scarcely distinguishable situation. There, the court stated, initially:

"The Board makes much of the supposed clarity of the cards used by the Union in this case, in contrast to the deceptive or ambiguous ones in other instances where it nevertheless upheld the union . . . But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations

matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. The very argument by which the Board has upheld unions even when the cards were deceptively worded, namely, of placing 'more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards' *NLRB v. Winn-Dixie Stores, Inc.*, *supra*, 341 F.2d at 754, works against it here. In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election."

One of the employees in the *S. E. Nichols* case had been told by the union representative that "There would have to be an election and if she wanted to change her mind, she could." Another one stated that the union organizer said he was soliciting cards "for the purpose of representing the union, to petition the NLRB in Washington as representative of the employees at Nichols to investigate the conditions in the store, and that if I signed the card I would not be joining the union . . ." and "In order to get the union in the store an election would have to be held in the store." A third employee was given similar assurances and interpretations of the purpose of the card. As in the instant case, the cards were essentially unambiguous and manifested an intention, on their face, to designate the union as the signer's collective-bargaining agent.

The Second Circuit reviewed most of the case law existing at the time and distinguished those cases wherein the union clearly advised employees that the cards could be used either for an election or for recognition without an election. The court went on to state:

“It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth. As has been well said, Note, *supra*, 75 Yale L.J. at 826:

‘If the employee thinks the cards will lead to a secret ballot, he can insure himself against the possibility of future retaliation and prevent harassment only by signing. Such an employee may sign a card planning to vote against the union or at least intending to reserve decision until he hears the employer’s views or talks to fellow employees.’

“We decline to encourage such an impairment of employees’ §7 rights.”

Thereafter, the same court, in *NLRB v. The Golub Corporation*, 388 F. 2d 921 (2d Cir., 1967), reaffirmed its *Nichols* position. Indeed, in that case the misrepresentations made to the employees are exactly the same as those in the instant case and both the Board and the Trial Examiner in each of the cases treated them exactly the same—*i.e.*, upheld the validity of the

cards notwithstanding the misrepresentations. The Second Circuit, however, stated:

“The Trial Examiner’s conclusion as to majority status rested on the legal premise which we have declined to adopt, *NLRB v. S. E. Nichols Co.*, 380 F.2d 438, 444-45 (1967), that even though a union has led signers of authorization cards to believe that it would obtain representative status only by winning an election, a card clear on its face is valid unless the employee was told that its sole purpose was to obtain an election—words such as ‘sole,’ ‘merely,’ ‘just,’ or ‘only’ being invested with a kind of talismanic quality . . .” The Board has not asked us to enforce the order on the grounds that Pepe’s or Petrignani’s cards were valid nor has it sought a remand for resolution of the credibility issue. Rather, conceding that the card of Marcella McCarthy also was invalid under the *Nichols* rule, it seeks enforcement on the basis that there are still enough valid cards to constitute a majority. We disagree; the cards of Eleanor Carbone and Vincent Zielnicki were also obtained by misleading the signers into the belief that the union would not become their representative unless it won an election. Freddie Russom, the solicitor who approached Pepe, Petrignani and McCarthy, had also solicited the card of Louis Peluso, telling him, in Peluso’s words, that by signing a card ‘I didn’t have to obligate myself to the union just that I would sign the card and I didn’t have to join if I didn’t want to,’ and had obtained the cards of five other employees only one of whom testified. Question has been raised whether proof of a pattern of misrepresentation by a particular solicitor may not require the General Counsel to come forward with testimony by all signers. Lesnick,

Establishment of Bargaining Rights Without an NLRB Election, 65 Mich. L. Rev. 851, 857-58 (1967). The Trial Examiner ruled against this on the basis that, under the 'sole purpose' rule, only two of Russom's solicitations could be faulted and no pattern of misrepresentation had been shown; if the correct figure was four out of five, a different result might follow. We therefore decline to enforce so much of the Board's order as holds that the company's refusal to recognize the union violated §8(a)(5) and turn to the alleged violations of §8(a)(1)."

Soon after the Second Circuit rejected Respondent's position, the Fourth Circuit in even more pointed language did likewise. In *NLRB v. S. S. Logan Packing Company*, 386 F. 2d 562 (4th Cir., 1967), still another case involving the application of *Bernel Foam* reached the circuit court. And once again, still another circuit court found it necessary not only to reject Respondent's peculiar position but to admonish it against continuing its practice. The court said:

"It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized [citing cases]. So has the AFL-CIO [AFL-CIO Guidebook for Union Organizers (1961), quoted in Senate Hearings on § 14(b), 190.]. In 1962, Board Chairman McCulloch presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results [1962 Proceedings: Section of Labor Relations Law, American Bar Association 14-

17]. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater the likelihood of a union election victory, but, obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

“The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying ‘No.’ [See, *e.g.*, recognition in the Organizer’s Guidebook, *supra*, of the fact that some cards are signed to ‘get the union off my back.’] This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

“That is not the most of it, however. Though the card be an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. ‘We

need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something? . . .

"The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

"For such reasons, a card check is not a reliable indication of the employee's wishes."

The issue became still more pointed in a companion Fourth Circuit case, *Crawford Manufacturing Co., Inc. v. NLRB*, 386 F. 2d 367 (4th Cir., 1967). The facts there are practically a carbon copy of those existing in the instant case. The evidence there showed that the union repeatedly emphasized to employees that the authorization cards it was soliciting would be used to bring about an election.

“At the very least, the findings of the examiner and the testimony of the employees make an issue of whether the cards were signed as a power to the union to act for the employees. Put the other way, the issue is made whether the cards were signed solely to procure an election.

“On the question whether the cards evidenced an intentional and intelligent authorization by a majority of the employees to the union to represent them, we think the burden of proof was on the General Counsel of the Board. *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482, 487 (5 Cir. 1967); *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F.2d 551, 556, 557 (6 Cir. 1967). Regardless, however, of where the burden lay, we are obligated to scrutinize the entire record and ascertain whether there is substantial evidence for the Board’s finding here that the union, when it demanded recognition, was representing a majority of the employees. *National Can Corporation v. NLRB*, 374 F.2d 796, 804 (7 Cir., 1967).

“The examiner here stated, with ample justification, that there was considerable confusion: some employees thought that by signing the cards they were only calling for an election, and others were confused by the union’s representations as to the significance of the cards. Actually, if we spell out of the cards the meaning attributed to them by the examiner—a dual purpose, first the call of an election and then admission to membership—the doubt still lurks, for even then the applicant’s membership is, in his own mind, conditioned on a union victory in the election. Proof of such a prevalent and pervading misconception when generated by the union organizers’ represen-

tations cannot be ignored. It is not decisive that the cards in their terms contained no suggestion that they signified anything less than a direct grant of authority for the union to act as collective agent for the employees. Despite the regard we hold for the contrary opinion, e.g., *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917, 920 (6 Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers . . .

“In fine, when as here substantial evidence does not show that the employees signed authorization cards free of any misapprehension of their purpose, a union majority entitling the union to representation cannot be said to have existed. Indeed, for the employer to have recognized it in these circumstances would have been a usurpation of the choice of a representative when by Section 9(a) of the Act, the selection belongs to the employees. In the face of such a doubt as presently appears, recognition by the employer is forbidden by law. *Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961).”⁹

While the court in *Crawford* may have possibly entertained the acceptance of evidence going to the subjective intent of the employees who signed cards, this factor was not the crux of the court’s decision. A care-

⁹That the Fourth Circuit does not take the position that authorization cards may never be used in lieu of an election to gain recognition is clear by a later case from that circuit, *NLRB v. Lifetime Door Company*, F. 2d (4th Cir., 1968). There the court examined the record carefully and concluded that because “there is no hint of impropriety in the solicitation or execution of the cards . . .” the Board’s order was justified.

ful reading of the *Crawford* case indicates that the Fourth Circuit has aligned itself with most other circuits which have refused to stick mechanically to the literal phrasing of the cards when presented with wholesale misunderstanding as to their purpose created by the union. The evidence that the Fourth Circuit said was proper to consider in weighing the validity of the cards is what was said to the employees at the time the cards were solicited. The subjective understanding of the employees solicited is an aid in determining the nature of the misrepresentations. The Court need not ignore this factor. At any rate, in the instant case, as will be shown below, not only did the Trial Examiner and Respondent reject any evidence as to what the employees actually believed to be the purpose of the cards, but they completely and unquestionably ignored the plethora of evidence that these employees were unmistakably misled as to the purpose of the cards. Thus, though some evidence of subjective intent under these circumstances is proper, it is neither necessary nor crucial in the premises because the evidence was overwhelming that the Union made wholesale misrepresentations in an effort to obtain cards.

The Associate General Counsel for the NLRB in a talk in February 1968 stated:

“The Board has chosen the *Crawford* case as the most appropriate vehicle available up to now for seeking Supreme Court review of the authorization-card issue. Petition for certiorari has just very recently been filed.” (Gordon, “Union Authorization Cards and the Duty to Bargain” Daily Labor Report, 33 BNA, Feb. 15, 1968.)

In April, 1968, the Supreme Court denied certiorari.

In March 1968, the Fifth Circuit was again met with still another case indistinguishable from the in-

stant one, *NLRB v. Lake Butler Apparel Company*, F. 2d (5th Cir., 1968). Once again, a circuit court rejected the Board's position and specifically disagreed with and indeed criticized the Board rule, formerly approved by the Sixth Circuit, that cards were valid unless the Union solicitor had stated to the employee that the *only* and *sole* purpose of executing the card was to obtain an election. *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), *enfd.*, *NLRB v. Cumberland Shoe Corp.*, 351 F. 2d 917 (6th Cir., 1965).

The Fifth Circuit recognized that the cards used at the Lake Butler Apparel Company had no reference to an election on them. Nonetheless, the Union solicitor had indicated to the employees that they were to be used to "petition for an election and that if we won the election we would be their bargaining representative."

The General Counsel had the burden of proving that the cards were not executed for the limited purpose of an election, the Court said, but he failed to carry that burden in connection with at least seven employees. They testified that they signed the cards only to get an election, and six were told that they could vote for or against the Union at the election. The Court said:

"These representations were not denied by the solicitors and their clear import is that they were false in light of the turn of events whereby the union is claiming recognition without an election. Our view is that they were conditions which attached to the fact of the card executions. The language printed on the reverse side of the cards [providing for union membership and check-off], which the employees did not read and no copy of which was left with them, must give way to the

agreement negotiated in each case between the solicitor and the employee.

“Because the record will not support a finding that the General Counsel overcame the testimony of these employees that they executed the cards on a misrepresentation of fact, it follows that these employees must be eliminated from the total of 37. Thus the union did not have a majority on May 19, 1964, the crucial date.”

In rejecting the *Cumberland Shoe* rule, the Court said that while that rule may simplify the problem of evidence, “there are countervailing policy considerations.” The rights involved are those of the employees, the Court said, and concluded, “A rule of convenience such as that formulated in *Cumberland Shoe* must give way to truth based on the record considered as a whole.” Such is the case here.

Recently, even the Sixth Circuit has recognized that the *Cumberland* rule, which it had formerly approved, simply cannot be adhered to in cases of this sort and it retreated from its previous position. The first case in which the Sixth Circuit began to restrict the *Cumberland* rule was in *Dayco Corp. v. NLRB*, 382 F. 2d 577 (6th Cir., 1967). The Court there recognized that the Union agent had misled employees into signing cards by emphasizing that the cards were necessary in order to secure a Board election. Citing *Bauer Welding and Metal Fabricators*, *supra*, the Court said, “where the union has engaged in such misrepresentation, cards so obtained are not necessarily a valid designation of a collective bargaining representative.” The Court found this especially true when the cards themselves included the holding of an election as one of its purposes. Therefore, viewing the evidence as a whole, the Court concluded the Board had not produced substantial evi-

dence to support the assertion that the union had possessed a valid majority.

A few months thereafter, the Sixth Circuit was again met with this now typical situation in *NLRB v. Swan Super Cleaners*, 384 F. 2d 609 (6th Cir. 1967). The Trial Examiner and Board in that case had rejected the company's claim that certain cards were void because Union solicitors had represented to the signers that the cards were to be used to obtain a Board election. In trying to ascertain whether the Union had a majority, the Court, assertedly "obedient" to its decision in *Cumberland Shoe*, nonetheless carefully inspected the evidence surrounding those cards which were the product of the signers' belief that they were to be used only to obtain an election. After examining that evidence, the Court stated:

"We at once make clear that we do not consider testimony of a subjective intention not to join the union as of controlling importance. See *Joy Silk Mills v. NLRB*, 185 F(2) 732, 743 (CA D.C. 1950) *cert. den.* 341 U.S. 914. But it is relevant in assessing the effect of the solicitor's words, for it casts a telling reflection on the actual communication conveyed to the signer. The testimony of the signer as to his *expressed* state of mind is also relevant in determining whether his misapprehension over the purpose of the card was *knowingly induced* by the solicitor. Such inducement of an employee who openly expresses an intention not to join the union suggests that representations concerning an election were intended to lead to a belief that the only purpose of the card was to hold an election. . . .

"*We think it right now to say that we do not consider that we have announced a rule [referring to *Cumberland*, *supra*] that only where the solicitor*

of a card actually employs the specified words 'this card is for the sole and only purpose of having an election' will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe whatever the style of actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election, an invalidation of such card does not offend our Cumberland rule. . . . (Emphasis supplied.)

"It appears that the examiner's position was, and the Board's position now is, that unless the solicitor has actually employed the words 'sole' or 'only' in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any such mechanical interpretation. The 'outright misrepresentation' referred to therein could certainly be accomplished by other words than 'sole' or 'only.' A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words*—'sole' and 'only'—employ language clearly calculated to lead a laundry worker to believe that the holding of an election was all that she signed up for."

The type of evidence that the Court examined is unquestionably indistinguishable from that involved in the instant case, as will be seen below. The exact same type of statements were made by Union solicitors in each of the cases. Indeed, here the Union's own literature, as will be shown, further stressed that the purpose of the card was simply to have an election.

In denying enforcement of the Board's order in *Swan Super Cleaners*, the Sixth Circuit cited with approval

Judge Friendly's statements made in *NLRB v. S. E. Nichols, supra*. All of these cases, as can be seen, have now almost become stereotype. The Union does everything in its power to convince the employees that the cards will be used for an election, notwithstanding the wording of the cards and has, up until recently, gotten away with this ploy by not using the words "solely" or "only." Now almost every circuit court that has met the issue has refused to condone this type of union practice; and the Supreme Court has effectively refused to support the Board.

In March of this year, the Sixth Circuit again rejected the Board's unfettered utilization of authorization cards. In *NLRB v. Shelby Manufacturing Company*, 390 F. 2d 595 (6th Cir., 1968) the court, in citing many of the cases already referred to herein, stated that the misrepresentation was made more clear in light of the fact that the "card solicitors did in fact represent to a number of employees that their purpose was to secure an election. The Examiner in his decision stated:

'Several witnesses testified that the talk all over the plant during the campaign was about having an election.' "

The exact situation here existed in the instant case—only magnified.

The Seventh Circuit has recently joined the tide in rejecting the Board's position in these situations. In *NLRB v. Dan Howard Manufacturing Co.*, 390 F. 2d 304 (7th Cir., 1968), among other issues involved was the question of the validity of a card signed by an employee on the basis of a misrepresentation that the card merely admitted her to a Union meeting and permitted her to vote for the Union. The representations made to this and other employees, as set forth by the circuit court in an appendix to its opinion, are a carbon copy

of the misrepresentations that existed in the instant case. The court there reviewed case authority in the field in light of the evidence and concluded that the testimony clearly inferred that the employee's card in question was obtained because the employee was led to believe that it would grant the Union an opportunity to have an election. The court rejected the Board's rule in *Cumberland* and concluded:

"In the recent case of *NLRB v. Swan Super Cleaners*, No. 16952 (October 25, 1967), the Sixth Circuit, through Judge O'Sullivan, explained its decision in *Cumberland*, expressly disavowing the view that *Cumberland* held that the very word 'sole' or 'only' was needed to invalidate a card. The court adhered to *Cumberland*, saying that its rule is not offended by invalidating cards, no matter what style or wording was used by the organizer 'if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election.' The court pointed out that it is relevant to consider the subjective intention of the signer and his expressed state of mind in deciding whether a misapprehension was knowingly induced.

"We apply the restatement in *Swan* of the *Cumberland* rule and hold that 'in its total context' the only reasonable inference that can be drawn from the Weiner-Burdette colloquy, as testified to by her, is that statements made by Weiner created in Burdette's mind a misapprehension as to what signing the card meant and that her signature on the card did not represent an intention to designate the Union as her bargaining agent."¹⁰

¹⁰Even more recently the Eighth Circuit has reaffirmed its position in *Bauer Welding and Metal Fabricators*, *supra*, and reasserted on March 12, 1968, in *NLRB v. Arkansas Grain Corp.*,
(This footnote is continued on the next page)

In light of the great weight of authority discussed above, an examination of the facts in the instant case will demonstrate beyond argument that that authority and logic is controlling in the instant situation.

The facts in the instant case show :

The Union, in its written communications to the employees, from the very start made it clear beyond contention :

(1) That the Union was attempting to have an NLRB election conducted in Petitioner's plant (as well as other plants) and that cards were being solicited for *that* purpose;

(2) That if sufficient cards were obtained, there would be an election;

(3) That the Union never stated it would attempt to use the cards for any other purpose but to have an election;

(4) That the Union never attempted nor did it advise the employees in any understandable manner that the cards could or would be used for any other purpose; and

(5) That most, if not all, of the employees in Petitioner's plant believed, based upon the Union's representations, that the only purpose of the cards was to have an election and acted in reliance on those representations.

..... F. 2d (8th Cir., 1968) that cards may be a totally unreliable indication of majority status. (See footnote 4 therein.) It would appear that the Tenth Circuit, as well, has held that cards are subject to a far more severe test than the Board would apply in proving their validity. The Tenth Circuit in *NLRB v. Midwestern Manufacturing Co., Inc.*, 388 F. 2d 251 (10th Cir., 1968), in rejecting the Board's position to require an order to bargain, examined critically this question.

B. The Facts Relating to the Union's Gross Misrepresentations.

The first communication which was circulated to the employees by the Union that is in evidence is a letter signed by Vincent Sloane, the UAW representative, dated March 3, 1965 [R. Empl. Ex. 4]. This letter, which was circulated and sent to "All Tool and Die Workers in Southern California," discussed the organizing drive of the UAW, the advantages of unionization, the meetings that were being held and concluded as follows:

"It is estimated that by March 14, a number of shops will be in a position to petition for elections. It is our intention to petition for each shop at the point where a substantial majority of the shop employees have signed and mailed in their Authorization Cards. I therefore urge you to make every effort to see that your shop is signed up at the earliest possible date. . . ." (Emphasis supplied.)

It is patently clear that from the start the Union made it clear to all employees involved that it was going to attempt to use the cards for one purpose—to petition for an election. No other purpose was even faintly suggested.

The second communication, which appears to follow up the letter of March 3, is R. Empl. Ex. 5, dated March 10, 1965, also signed by Sloane. This letter, which was also sent or circulated to "All Tool and Die Workers in the Southern California Area," began as follows:

"I am pleased to announce that the UAW Organizational Drive now in progress to organize all of the tool and die industry in Southern California is proceeding at an encouraging and rapid

pace. Signed UAW Authorization Cards from almost all of the plants involved are being received every day. *At this point in the campaign, a number of the plants involved are almost ready to petition for their secret ballot representation elections.* (Emphasis supplied.)

Once again, the Union told all employees that the purpose of these cards was to petition for a secret ballot representation election; and once again, not the slightest hint that cards were being collected for any other purpose.

But if there were any doubt at all as to the Union's program of deception in misrepresenting to employees that the cards were only to be used for purposes of an election, such doubt was resolved by the Union's distribution of what is entitled "UAW Fact Finder" [R. Empl. Ex. 6]. Not only did the Trial Examiner give little or no attention to R. Empl. Exs. 4 and 5, but he, enigmatically, summarily dismissed the very existence of R. Empl. Ex. 6. Clearly, his actions in this regard cannot be sustained. This clever piece of propaganda was distributed to the employees at Union meetings during the period that the Union was soliciting cards. It is drafted in the form of a questionnaire wherein the employee is to check off which of three alternative answers to each question is the correct one. The questions are extremely revealing as to what the Union was trying to connote to the employees and the suggested answers, one of which was presumably true, are even more revealing. Virtually all of these questions deal solely with the question of an election, as can be seen by a copy of R. Empl. Ex. 6, attached herein as Appendix "A".

The first question and set of possible answers deals with the percentage of cards of employees required to

have a secret ballot representation election. The second question considers the most effective way to obtain cards from employees. The third statement and the possible alternative answers reads as follow:

“When a tool and die worker signs a U.A.W. Authorization Card, it means that—

- A. He will definitely vote ‘YES’ for the U.A.W. on Election Day. ☐
- B. If the employee knows very little about the U.A.W., its contracts and achievements, he may still be swayed by last minute Company letters and captive audience meetings to vote for the Company. ☐
- C. He is just trying to get the Volunteer Organizer off his back.” ☐

Thus, in plain, unambiguous language, the Union told the employees that the card means one of the above three things. *Nothing* whatsoever either in that statement or in any other statement in R. Empl. Ex. 6 (or in any other communication in evidence) remotely hinted that the cards were to be used for any other purpose. No reasonable man can read R. Empl. Ex. 6 (as well as the other Exhibits) and conclude other than that the Union made a deliberate attempt to make employees believe that cards were for one purpose and one purpose only: to have an election. All the other questions on that document discuss the secret ballot representation election. All this long before the Union ever filed a petition for an election and all this during the time that the Union was actively soliciting cards. Surely, such deception not only taints and clouds the cards that were signed under these circumstances but makes them totally unacceptable for any purpose. The

Trial Examiner and Board could not explain R. Empl. Ex. 6 in light of their reasoning and findings, so they simply ignored it, as they essentially did with the other germane exhibits.

In an attempt to escape the powerful impact of the misrepresentations contained in the Union's literature, Union representative, Sloane, testified that at one of the many meetings the Union had, held on February 28, 1965, he advised the employees there of the procedure under the NLRA and read to them a demand letter previously sent to the Cadillac Gage Company in Costa Mesa [G.C. Ex. 36] which, he asserted, would have advised the assembled employees that the Union would, in the instant case, use the cards for the purpose of demanding recognition without an election. He further testified that he told the employees, based upon his experience, that companies never recognize unions based upon such demand letters and that there would undoubtedly have to be an election [R. T. 693, line 11, to 697, line 23].

Throughout the long hearings, dozens of employees were called upon to testify by both parties. Of these many employees, some 23 gave testimony indicating that they were present at one or more of the Union meetings held in February and March of 1965. In not a single instance did any of these employees testify that Sloane read the material he claimed to have read. In fact, 14 of these employees were called by the Board and not one of them supported Sloane's testimony; indeed, at least four of them pointedly contradicted him. Even among the Union's most stalwart supporters there is no support for Sloane's testimony, though these employees were present at the meetings where he spoke (See testimony of Cantrell, I. Klein, Rawl, Ahlstrom, Burke, Williams, Hughes, Wright, Kastendick and A.

Crandall). Of the four General Counsel's witnesses who described what Sloane had said at these meetings, Virgil testified that at the meeting he attended, Sloane stressed the importance of the cards and said the more cards that the Union had signed, the greater the chance of winning the election [R. T. 374, lines 2-11] and testified to nothing about Sloane advising the employees that they could be represented by the Union without an election. Kofink, called by the General Counsel, testified on cross-examination that he attended the meeting of February 28 (the same meeting that Sloane discussed in his testimony) and in regard to what Sloane said, Kofink testified:

"A. It seems to me that it was stressed that as many—to get as many cards as possible signed in order to have an election. . . .

Was anything said by Mr. Sloane about the Union representing the employees without an election?

A. No.

Q. Did Mr. Sloane say other employees—that the people there should get other employees to sign the cards.

A. Yes.

Q. Did he say why?

A. For that reason.

Q. To have an election?

A. Yes.

Q. Didn't he say the more cards that they had, the better chance they had of having an election?

A. That is correct.

Q. After he spoke and made these statements is when you signed your card; is that correct?

A. That's right." [R. T. 505, line 24, to 506, line 23].

On redirect examination, he testified:

“Q. Do you recall what he said about a majority in the cards?

A. That a certain percentage was needed, 51 per cent out of 100, I guess.

Q. For what purpose?

A. In order to have an election.

Q. I see.

Do you recall Mr. Sloane reading a letter at that meeting? [Referring to Cadillac Gage demand letter.]

Mr. Tobin: Objection.

Trial Examiner: Overruled.

The Witness: No, I don't.” [R. T. 507, line 19, to 508, line 22].

Robert Weymar testified on cross-examination that at that same meeting he recalled Sloane saying:

“A. He said something—at the end of this meeting, he said, ‘If anyone has not signed an authorization card yet, there will be more available for those that haven't signed, and we are trying to get as many as possible signed to get enough power to bring an election about.’

Q. Did he say anything about having the Union represent the employees without an election?

A. Not that I recall.” [R. T. 518, line 23, to 519, line 5].

On redirect examination, Weymar testified:

“Q. You remember Vincent Sloane talking?

Now, the best you can recall, what did Mr. Sloane say about the organizational campaign at Mechanical Specialties?

A. I am quite sure he did not mention Mechanical Specialties at that time. He was talking about a union campaign in Southern California

which included certain number of tool and die shops.

Q. I see.

Now to the best of your recollection, what were his words with regard to the authorization cards?

A. I remember him speaking about a certain percentage, which I am not sure of what it was, but in connection with the fact that if enough employees would sign the cards there would be an election held.

Q. Did he mention anything about the Union getting in without an election? Do you call?

A. I don't recall that, no." [R. T. 529, line 19, to 530, line 13; 531, lines 14-23].

Cisneros testified on cross-examination that at a union meeting which he attended, Sloane stated that they were going to call an election and Cisneros recalled that Sloane said at that meeting that all he needed was 50 per cent to call an election [R. T. 585-586].

Nine other employees who were present at meetings at which Sloane spoke were called by Petitioner. All of those either contradicted Sloane's testimony or could not support it.

Dellomes testified that he attended three meetings where Sloane spoke and he recalled him stating that the Union had to have a certain number of cards "that were enough to gain an election, and we needed more cards to show a greater strength of employees for the Union." [R. T. 1356]. Polony testified that he was under the impression that the cards were for the purpose of having an election and that a number of employees told him that the statement on the card that served as authority for the U.A.W. to represent the signer "didn't mean a thing." [R. T. 1372]. He

could recall that at neither of the two meetings he attended where Sloane spoke was anything said that the Union could represent employees without an election [R. T. 1375, lines 2-9]. The evidence showed that Estrada attended the meeting of March 14 but his testimony also fails to support Sloane's assertions.

Riegler testified he was present at the Union meeting of March 14 and that he recalled Sloane speaking.

"A. Yes. As far as I recall, he said they have given us cards to sign now, but it is also good to get as many as possible, because they are going to be a few guys that will change their minds until the election.

Q. Do you recall him saying anything about having the Union represent the employees at Mechanical Specialties without an election?

Mr. Somers: Objection.

Mr. Arnold: Objection.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: Not that I recall, sir." [R. T. 1390, line 25, to 1391, line 11].

Booze testified that he attended three meetings where Sloane spoke and that he "explained the cards to us. He said at such time we would have enough we would have an election." [R. T. 1426, lines 12-13]. He further testified that Sloane did not say anything to the effect that the Union could represent the employees of Petitioner without an election. [R. T. 1427, lines 14-23; 1432, lines 2-19].¹¹ Lawrence testified that he

¹¹On cross-examination, Booze gave the only semblance of support to Sloane's testimony of all the witnesses who testified on the subject. He stated that Sloane said that if enough cards were signed, they would be presented to the Company but that the Company would turn them down and that there would be an election [R. T. 1433, lines 3-11]. This statement scarcely supports the General Counsel's position in that it is not known

attended Union meetings where Sloane spoke and that based upon Sloane's statements made concerning the cards:

"I understand Mr. Sloane to say about the authorization [cards] that it was for the purposes of holding an election." [R. T. 1480, lines 12-14].

He further testified on cross-examination, based upon what he heard at three or four meetings he attended, it was his understanding that if the Union got over 50% of the cards, they would "demand an election" and he recalled nothing being mentioned about a 30% figure [R. T. 1484, lines 7-22].

Cuda testified that he signed his card at a Union meeting and that based upon what was said at that meeting, his "recollection was that by signing the card, it gives us the right to have an election in the shop." [R. T. 1503, lines 3-22]. On cross-examination, he could not recall Sloane or anyone else saying that if more than 50% of the cards were gotten, the Union would ask the company to recognize it [R. T. 1504, line 18, to 1505, line 7].

Garger also was present at Union meetings where Sloane spoke and recalls him saying:

"A. Well, in order to have an election we would have to have at least 30 or 33 per cent. I couldn't tell you for sure, the authorization cards signed, so the Labor Board would conduct an election." [R. T. 1518, lines 2-5].

at which of the many meetings Sloane made this statement and to how many employees he made it or if he just made the statement to Booze. Moreover, it certainly did not, nor could it, enlighten Booze or any other employee that the cards would be used for any other purpose than to have an election. Indeed, even if Sloane were credited against the overwhelming evidence, it scarcely supports the General Counsel's position, as the court in *Crawford, supra*, emphasized where essentially the same situa-

(This footnote is continued on the next page)

Berno attended the meeting of March 14, 1965. He testified that at that meeting, R. Empl. Ex. 6 was distributed to each of the employees attending the meeting [R. T. 1723-1724]. He further testified on direct examination that at that meeting the Union speakers said that if they had enough shops going that they would force the Southern California Tool and Die Association into a master shop agreement and that Sloane had said, among other things, that a letter had been sent "the previous Friday, petitioning for an election . . ." [R. T. 1725-1726]. On cross-examination, Berno reiterated his testimony. [R. T. 1777].

Thus, when the record is reviewed, the overwhelming weight of evidence points clearly to the fact that Sloane, rather than contradicting the deception set forth in R. Empl. Exs. 4, 5, and 6, and rather than explaining to the employees that the cards could or would be used for a purpose other than an election, compounded these misrepresentations by dinning into the ears of these employees at organizational meetings that the sole purpose of obtaining cards was for one end, and one end alone, to have an election.

And the Union's not so subtle method of deception was carried on in the plant by Union organizers and adherents who sought to get other employees to sign cards. Constantly and consistently, Union solicitors inside the plant impressed upon often reluctant fellow employees the asserted fact that cards were only to gain an election. For example, Christenson, who at the time of the hearing was working for another company, testified that Cantrell, one of the leading Union supporters in the plant, several times approached him and

tion existed. Moreover, the Trial Examiner expressly found that Sloane told the employees that the Union was seeking representation, "and that this would come through elections conducted by the [Board]". [C. T. 24, line 56, to 25, line 4].

asked him to sign a card. Christenson told him that he would not sign one, but Cantrell said, on one occasion, that if Christenson did not sign one, then Cantrell himself would sign one for him and send it in. He further told Christenson that if Christenson signed the card, he would be under no obligation whatsoever and all it would do would have the effect of putting him on the mailing list [R. T. 1458, line 18, to 1459, line 9]. Christenson further testified that both Irving Klein and Ahlstrom, two other strong Union adherents who were attempting to have other employees sign cards, sought to have Christenson sign one as well and told him in the presence of many other employees (including Estrada) that "if I signed the card, I wouldn't be under any obligation; just sign it and I would be on the mailing list and at that time there would be a vote to see if the Union would come in or not." [R. T. 1460, line 24, to 1461, line 19]. On cross-examination, Christenson reiterated his testimony [R. T. 1464, lines 7-17; 1465, line 3, to 1468, line 23].

Garrett testified that during the time that cards were being passed out, George Wilson, another Union adherent, requested him to sign a card and when Garrett indicated he wanted more information as to the Union before signing, Wilson advised him that by signing a card, he would be on the mailing list and would have the information mailed to his home. Wilson stated to Garrett that "If there were enough cards within a certain length of time, the Company would be petitioned for an election." [R. T. 1419, line 18, to 1421, line 6]. An offer of proof was made at this point that Garrett signed the card to enlighten himself and would not have signed it if he thought there would not have been an election. The offer of proof was rejected [R. T. 1421, lines 17-20]. A similar offer of proof in regard to Haeler was made and rejected [R. T. 1795].

As pointed out elsewhere in this brief, Homnan (Narathip) was extremely limited in his ability both to speak and understand English and did not make out his own card but that his fellow Thai countryman (Anothaiwongs) did. Homnan, who admitted and whose testimony makes obvious that he had virtually no understanding about unions, heard fellow employees talking about an election and, based on that, Homnan signed a card. (The last statement was considered "going to intent" and the General Counsel's objection was sustained.) [R. T. 495, line 2, to 496, line 16]. On recross-examination, Homnan reiterated that before signing his card, he had heard talk about an election and that he was not very clear about the Union [R. T. 498, lines 9-24]. Once again, the General Counsel's objection was sustained to the question to this witness as to the reason for his filling out a card [R. T. 500].

An offer of proof was made, though rejected, that the employee Hunt was approached by Voegeli, a fellow employee in support of the Union, and was told that the card was only for the purpose of bringing about an election and that it didn't mean anything else [R. T. 1475, line 2, to 1476, line 19].

Knoles (Knowles), a retired employee of Petitioner at the time of the hearing, testified at the time he signed his card he had been under the impression that the Union was seeking a unit for the entire Southern California tool and die industry [R. T. 414, lines 14-22; 416, line 23, to 417, line 6] and based upon the fact that there would be an election in the entire industry, he signed a card [R. T. 417, lines 20-25]. This impression by Knoles was obtained from what employees were saying and from the Union literature that had been posted in the restrooms [R. T. 419, line 20, to 420, line 8]. When Voegeli approached him and

asked him to sign the card [R. T. 418, lines 24-25], in answer to the General Counsel's question as to whether Voegeli told him the card was "only for an election," Knoles replied, "He said it was for an election—so we could have an election. . . . We wanted an election for Union representation." [R. T. 422, line 21, to 423, line 18].

An offer of proof was made that Mancini was presented with a card by George Wilson and was told by the latter that "the card means nothing at all; it is simply to bring about an election." The offer of proof was rejected [R. T. 1487, lines 3-23]. Mansfield testified that he discussed the cards with other employees, at least a dozen times, and that it was repeatedly stated that the purpose of the card was for the "right to petition an NLRB election, a very common procedure." When asked his understanding of the card when he signed it, an objection was sustained by the Trial Examiner who recognized that there might be an "inconsistency of [his own] ruling on this question." [R. T. 627]. Mellone testified that Irving Klein gave him a card and:

"Mr. Klein said that there was a percentage of cards needed for an election. He told me that nobody would see the card; that it would be non-committal; only as an intention on my part for the union representatives—to have them have an election." [R. T. 1437, lines 4-8].

Polony testified that he was concerned by the fact that the card stated that it authorized the UAW to represent him; accordingly, he asked a number of fellow employees what it meant and was told that the card itself "didn't mean a thing." This statement was made to him by those employees who were urging him to sign. On cross-examination by the General Counsel, Polony testified:

Q. Do you recall who told you the card was for an election?

A. I couldn't tell you which exact guy it was, because I might tell you the wrong guy, but I know it was one of the guys that was strongly for the Union.

Q. You don't know which employee told you that; is that correct?

A. Not the particular one, but it was—there were at least three of them.

Q. What did this employee tell you about the card?

A. Well, when I asked him about the authorization without an election, he told me, 'Don't worry about that. It is just a formality. We have got to have an election.' " [R. T. 1378, lines 4-15].

An offer of proof was made, though rejected, that Polony signed the card solely because of what was told him, to wit, that the card was simply to have an election and had no other meaning [R. T. 1374]. Rhedin, who testified that he did not read the card carefully, was presented his card by Voegeli who told him that "they were trying to get an election." For this reason, Rhedin signed. An offer of proof was made that he would not have signed the card if he did not think there would be an election. Based upon what he was told, the offer was rejected [R. T. 1449, line 10, to 1451, line 1]. Similar testimony was given by Scovel and Senyk but offers of proof were rejected to the effect that each of them was told by the person who was seeking their signatures on cards that the purpose of the card was merely for an election [R. T. 1403; 1493]. Virgil testified on direct examination that at the time he signed there had been a great deal of talk in the plant that the purpose of signing cards was to bring about an election [R. T. 380]. The Trial Examiner

sustained the objection to Petitioner's question of Virgil as to whether or not he would have signed if he thought there would not have been an election [R. T. 382]. Virgil testified that Johnson told him when he requested that Virgil sign a card that "it would authorize the Union to come into the shop with enough cards—with enough cards it would bring in an election." [R. T. 382, line 19, to 383, line 3].

Taking all the above evidence together, there is no doubt the Union deliberately and its adherents (possibly innocently) duped the employees of the plant into believing that, notwithstanding the language of the cards, they were to be used solely to gain an election.¹² At this stage, to utilize these cards to assert that the Union had a true majority of employees who desired that the UAW represent them for collective bargaining purposes would be to reside in an Alice in Wonderland world. Neither the Board nor the courts should lend support to this type of constructive, if not actual, fraud. Thus, it is Petitioner's position, upheld by many circuit courts, that the cards, *generally*, under these circumstances, may not be given effect, as the General Counsel would desire. See *Bauer Welding and Metal Fabricators, Inc.*; *Crawford Manufacturing Co.*; *Shelby Manufacturing Company, supra*.

¹²The record shows that other employees were also victims of other types of misrepresentations and coercion that affected the validity of their cards. For example, an offer of proof was made that Ampthor signed his card in order to get employees off his back who were repeatedly pestering him to sign [R. T. 651; 1237]. Anothaiwongs told supervisor Isaac that employees were bothering him to sign, that they were very "nasty" to him and that he wanted to keep the Union adherents off his back [R. T. 1564-1565]. An offer of proof was made that Seymour, who did not read his card, signed in order to remain on friendly terms with his fellow employees and did not want the UAW to represent him [R. T. 1442-1443]. An offer of proof was made that Addison was told by solicitor Kastendick that if he signed, the Union would have 100% of all employees [R. T. 1490].

Moreover, particular cards, at any rate, must be eliminated because the signators had individually been hoodwinked and misled as to their purpose. *Among* those particular cards which are not valid for the purpose of determining whether the Union had a majority are the following:

1. *G.C. 31—Knoles (Knowles)*—This witness, who testified that he signed under the impression that he thought it was going to be for the entire Southern California industry, and was so told, testified in answer to the General Counsel's questions that solicitor Voegeli told him that the purpose of the card was to have an election [R. T. 414, lines 14-22; 416, line 23, to 417, line 6; 417, lines 20-28; 418, lines 24-28; 419, line 20, to 420, line 8; 422, line 21, to 423, line 18]. Under these circumstances, in light of the entire record, Knoles' card cannot be counted.

2. *G.C. 34—Proudfoot*—This witness, who could not recall the date he signed the card and could not recall whether or not he read it, assumed that the card would "just lead to an election." When asked to state his understanding and meaning of the card, he testified that he understood that an election comes first [R. T. 480, line 12, to 481, line 16; 482, line 12, to 483, line 24]. In light of the fact that the authenticity of the card to begin with is in question because of the doubt as to its dating and, more particularly, in view of the fact that the witness did not read the card and his understanding was that it would "just lead to an election," this card, too, cannot have the evidentiary weight the General Counsel requests.

3. *G.C. 43—Booze*—This witness testified that Sloane "explained the cards to us. He said at such time we would have enough, we would have an election." [R. T. 1426, lines 12-13; 1427, lines 14-23;

1432, lines 2-19]. Under the circumstances, therefore, the card may not be added to the Union's total.

4. *G.C. 44—Cheetham*—This individual, who had been a member of labor unions both in England and Canada before coming to this country and was a shop steward in England, testified that based upon his Union experience in those countries, a secret election must be held before the Union is selected [R. T. 1410, line 3, to 1411, line 22; 1418]. Though the answer was stricken after objection, the witness testified that he would not have signed if he thought there would not be an election [R. T. 1412, line 20, to 1413, line 23]. As the Trial Examiner indicated, the man's past history certainly is a matter for consideration and, we submit, negates the purported effect of the language of the card, particularly in light of the Union's repeated statements as to its purpose.

5. *G.C. 45—Christenson*—This former employee during the winter-spring of 1965, was one of the leading anti-union employees in the plant. As indicated above, he was presented his card by solicitor Cantrell who, after Christenson said he was against the Union, told Christenson that he would be under no obligation whatsoever and it would only be putting him on the mailing list [R. T. 1458, line 18, to 1459, line 9]. Other employees who were distributing cards and urging him to sign told him the same thing and explained to him that there would be an election and he could then vote as he would want [R. T. 1460, line 24, to 1461, line 19; 1464, lines 6-17; 1465, line 3, to 1468, line 23]. It is clear, therefore, that this card must be discarded.

6. *G.C. 47—Cisneros*—This witness testified that based upon what he heard and what other employees

had told him about the Union, he understood there was going to be an election and he testified he recalled Sloane stating the Union was going to call an election and that all it needed was 51 per cent of the employees to "call an election." [R. T. 581, lines 19-24; 583, lines 4-14; 585, line 4, to 586, line 13]. Accordingly, Cisneros' card cannot have the evidentiary weight sought by the General Counsel.

7. *G.C. 52—Cuda*—This employee had been working for Petitioner for nine years, prior to which he lived in Canada and Czechoslovakia [R. T. 1501-1503]. He was a member of a union in Canada [R. T. 1504]. He testified that at the time he went to the meeting and based upon what he heard at the meeting, it was his understanding from what the speaker said that cards would give the employees the right to have an election. An offer of proof was made that he could not have signed a card had he interpreted the speaker any other way [R. T. 1503-1504]. Under these circumstances, in view of the Union's misrepresentations both in writing and verbally, the card can have no effect.

8. *G.C. 53—Dellomes*—This employee was one of the most vigorous anti-union employees in the plant. He testified that at three meetings he attended, he recalled Sloane stating that the Union had to have a certain number of cards "that were enough to gain an election and we need more cards to show a greater strength of the employees for the Union." Testimony showed that Dellomes got into vigorous arguments with Cantrell regarding the Union and that he told employees that he had signed the card solely to gain an election so that the Union matter could be gotten over with. In fact, he further testified that he told the employees he would quit his job rather than participate in

a union. He did not read the card and an objection was made and sustained to a question as to his understanding of its purpose [R. T. 1359-1361; 1364-1366; 1667]. It would be a travesty of justice to hold that Dellomes intended that the UAW represent him.

9. *G.C. 58—Garger*—This employee, who had come from Austria to this country approximately five years ago, testified that he was present at a meeting where Sloane stated that a certain number of cards had to be gotten so the "Labor Board could conduct an election." [R. T. 1518, lines 2-5]. Nothing was ever said that the Union could represent the employees without an election [R. T. 1517-1518]. An offer of proof was rejected to the effect that Garger understood the card to be for the purposes of an election. Under the circumstances of this case, we submit that there can be no question that Garger did not intend that the Union represent him without first gaining representation via a secret election.

10. *G.C. 59—Garrett*—When George Wilson handed Garrett a card and asked him to sign it, Garrett indicated he had not made up his mind and Wilson advised him that if he did sign, he would be on the mailing list [R. T. 1419, line 21, to 1420, line 17]. Subsequently, Wilson told him that if enough cards were gotten, the Company would be petitioned for an election [R. T. 1420, line 18, to 1421, line 6]. An offer of proof was rejected to the effect that Garrett signed solely to enlighten himself and would not have signed if he thought there was not going to be an election [R. T. 1421, lines 7-20]. This employee's card, as well, can have no legal effect.

11. *G.C. 66—Homnan (Narathip)*—This employee, who obviously had a very limited command of English

and who scarcely understood anything about unions, neither filled out nor read his card; indeed, he was unable to read, let alone understand, the words "collective bargaining representative." He was told by his fellow Thai countryman, Anothaiwongs, that there would be an election and he understood that the purpose of the card was to have an election [R. T. 489-500]. To hold that Homnan intended to authorize the UAW to represent him without (or even with) an election may possibly excite our imagination but it certainly cannot be upheld in law.

12. *G.C. 72—Kofink*—This witness of the General Counsel testified that Sloane stated that the purpose of the cards was to have an election and that the reason for obtaining cards was to bring about an election. The same thing was being said by other employees. Nothing was said by Sloane or anyone else that the Union could represent the employees without an election [R. T. 503; 507, line 19, to 508, line 22]. It was after these misrepresentations were made that Kofink signed; the evidence is clear that Kofink was actually against the Union and one of the reasons he left Germany was because of his experiences with unions there [R. T. 780]. To use Kofink's card to accomplish this coup d'etat in favor of the Union would be authorizing an Anschluss.

13. *G.C. 73—Kuhmann*—Kuhmann, who came over from Germany approximately five years ago and who is limited in his use of English [R. T. 563; 1683], was concerned about the pressure being applied on him by fellow employees to sign a card. An offer of proof was made and rejected that at the time he signed, he had no intention of becoming a member of the Union though he did think that the Union would get him more money. His understanding of the card and the

concept of authorizing the UAW to represent him in collective bargaining was, to say the least, vague [R. T. 563-566]. It is submitted that there is an insufficient degree of intent and clarity so as to permit Kuhmann's card to be used on behalf of the Union.

14. *G.C. 75—Lawrence*—This employee testified, both on direct and cross-examination, that he did not recall reading the authorization language on the card [R. T. 1481; 1484]. He attended three or four meetings and signed a card at one of the meetings; he understood Sloane to state that the cards were for the purpose of having an election [R. T. 1479, line 16, to 1480, line 15]. It was his understanding, based upon what Sloane said, that if the Union got over 50% of the employees' cards, it would demand an election [R. T. 1484]. An offer of proof was made and rejected that had Lawrence known that the Union could represent him without an election, he would not have signed [R. T. 1482]. It is quite clear that Lawrence was the victim of misrepresentation and that it would be highly improper and contrary to this employee's rights, to use this card as the UAW desires.

15. *G.C. 83—Polony*—This employee, who testified that he was concerned about the language on the card, stated that employees who were trying to convince him to sign one told him that the authorization language "didn't mean a thing" and that the card was strictly for an election; the card was just a formality to gain an election [R. T. 1372-1373; 1375-1376]. An offer of proof was made that Polony signed based upon these representations and that he thought that by signing, he would merely be bringing about an election [R. T. 1374]. It would be grossly improper to hold that Polony, who made every effort to ascertain the true meaning of the cards and who, based upon misrepresenta-

tions, signed on, should now be told that his reason for signing has no meaning.

16. *G.C. 84—Rhedin*—This employee testified he did not read his card but that when solicitor Voegeli asked him to sign, he told Rhedin that “they are trying to bring about an election.” An offer of proof was made that he would not have signed a card except for his understanding that there would be an election [R. T. 1449-1450]. This card, too, cannot be used to favor the Union’s cause.

17. *G.C. 91—Virgil*—This witness testified that at the meeting he attended, Sloane stressed the importance of the cards and stated that the more the Union had, the greater its chance of winning an election. Sloane said nothing about the employees being represented by the Union without an election [R. T. 374, lines 2-11]. He further testified that at the time he was given a card, he stated that he actually was against the Union [R. T. 378, lines 17-21]. He was also told by the person who gave him the card that if the Union got enough cards, “it would bring about an election.” [R. T. 382, line 19, to 383, line 3]. And throughout the period of time that cards were being distributed and until the time he signed one, a number of employees around the shop were stating that the purpose for the cards was to bring about an election [R. T. 380-381]. Virgil’s card cannot properly be used to support the Union’s alleged majority.

8. *G.C. 93—Vogl*—The Trial Examiner sustained objections to Petitioner’s questions to this witness, both as to his understanding of the card and as to what he believed would happen after he signed one [R. T. 555-556]. An offer of proof was made and rejected that the witness’ understanding of the card was that he was authorizing the Union to conduct an elec-

tion and that was his sole purpose for signing. He was not informed that the Union could come in without an election when he signed [R. T. 556]. This witness' testimony made it quite clear that he did not intend by signing to authorize the UAW to act as his collective bargaining agent.

19. G.C. 95—*Robert Weymar*—Weymar testified, both on cross and redirect examination, that Sloane made it quite clear that the purpose of the card was to have an election and that Sloane did not indicate any way the Union could become the collective bargaining agent without an election [R. T. 529, lines 8-11; 529, line 19, to 530, line 13; 531, lines 14-23]. He further testified that he discussed with perhaps as many as ten other employees the purpose of the card and that there would be an election, all these discussions during the period of time that the Union was soliciting cards [R. T. 522, line 8, to 523, line 14; 541, lines 17-22]. Based upon the misrepresentations made to him by Sloane, to say nothing of the "general atmosphere" regarding the "forthcoming" election, G.C. 95 does not represent the true intent of Weymar to designate the Union as his bargaining agent.

The foregoing evidence, taken separately or together, indicates beyond a shadow of a doubt that the Union, clearly through design, and its adherents, perhaps through innocence, perpetrated specific acts and created a general atmosphere that can only be labeled false and misleading. The cards, therefore, are not only under a cloud of unreliability but in the above specific cases must necessarily be discarded. Though at times the signators' subjective thoughts are intertwined with the objective misrepresentation set forth by the Union and its adherents, such evidence should be weighed together as case authority now holds.

The Eighth Circuit in *Bauer Welding and Metal Fabricators, Inc. v. NLRB*, *supra*, was met with a

very similar case. There, as allegedly here, there were 8(a)(1) and 8(a)(2) violations. There, the Union lost the election by a vote of 12 to 11. (Here, the Union lost the vote 59 to 40.) There, as here, the Union invoked the doctrine of *Bernel Foam* and, as here, the cards themselves were unambiguous. There, as here, the Union, however, distributed letters and bulletins which clearly purported to emphasize an election to the exclusion of recognition without an election. Indeed, R. Empl. Ex. 6, as well as R. Empl. Exs. 4 and 5, in the instant case are far more misleading and a far greater misrepresentation of the true facts than is the letter that the Eighth Circuit relied upon in holding that the cards must be discarded because of the misleading nature of the Union's communications to the employees.¹³

¹³The initial Union letter to the employees in that case stated:

"Dear Friends:

"YOU CAN HAVE A UNION IN YOUR PLANT IF YOU WANT ONE!

"Just fill out the enclosed authorization card and return it to us. The card will then be turned over to the National Labor Relations Board, a branch of the United States Government.

"This is your right under the law. The National Labor Relations Board will then conduct an election in your plant by secret ballot.

"However, the United States Government will conduct an election *only* if we show them that the employees have asked us to represent them. Your employer will never see these cards.

"If the majority of the employees vote to be represented by the Union, the United States Government will then certify the Union as the bargaining agent for the employees.

"The Sheet Metal Workers' Union understands your problems and is standing by ready to help you. The sooner we get the cards back, the sooner Uncle Sam will conduct an election in your plant, and we will be able to help you.

"You will choose your shop stewards and negotiating committee. The Union will work with you to negotiate your own Union contract and wages and working conditions you will not be ashamed to work under.

"REMEMBER—Together we stand united—alone the Company owns you! BELONGING TO THE RIGHT UNION DOESN'T COST—IT PAYS!"

And there, as here, the Petitioner urged that based upon the employees' own testimony, cards were signed because of what the Union representatives and adherents had said; employees were under the belief that they were merely indicating their desire for an election. The Court said:

"In support of the above determination, we note that no less than six of the petitioner's employees testified before the Examiner that they signed and returned their cards to the Union believing only that they were indicating their desire for an election. On of the respondent's own witnesses, David Nelson, testified on direct examination:

'Q. At the time that you signed that card, did you personally want the union to represent you?

A. I wasn't sure, because I didn't know anything about it. I never worked in a union shop before, so I had no knowledge of it, outside of the letter which I had received with it. I talked to very few, so my information was very scarce.'"

The Court recognized that under the circumstances, some subjective evidence was being accepted by it. Noting that the rule is generally that subjective type evidence cannot negate the action of signing a card, the Court stressed that where there are misrepresentations, then to disallow such employee testimony as to their purpose for signing would constitute nothing less than an invitation to fraud on the part of unions. The Court said:

"The Board objects to the admission of such testimony on the basis of language to which we lend approval in *Colson Corp. v. N.L.R.B.*, *supra*, at page 135 of 347 F.2d, wherein we acknowledge that an employee's after-thoughts as to why he

signed a union authorization card would not negate his overt action of having signed the card. There can be no doubt that this is the general rule without misrepresentation being present. Misrepresentations, however, are present herein to the extent that petitioner's employees relied on the letter and believed that they were only showing a desire to have an election by signing the cards. Without this qualification, a union could be blatantly guilty of the most flagrant misrepresentations and be protected through the disallowance of any employee's testimony, once the employee signed the authorization card. Cf., Restatement of Torts, §525 (1938). See, *N.L.R.B. v. Peterson Bros., Inc.*, 5 Cir., 1965, 342 F2d, 221, 224."

The Court went on to point out:

"Even without considering the testimony of the employees as to why they signed the cards, there still is strong and persuasive evidence indicating that many of the employees who signed the cards did not intend anything more than just authorizing an election by their act. The strongest evidence is the May 19, 1964 letter itself. Further evidence indicates that Johnson, who signed the letter, told Gerald Wachowiak, in a telephone conversation which took place on or about June 2, 1964, that:

'A. Well, he said that they had a majority of the cards, and that after he received a few more cards, there would be an election.

Q. Mr. Johnson told you at that point that there would be an election, is that correct?

A. Yes. . . .'

"In *N.L.R.B. v. Peterson Bros., Inc.*, *supra*, the court held that because of an ambiguity in the authorization card the holding of the Board

as to representation was clearly erroneous. Therein Chief Justice Tuttle stated, at page 224 of 342 F.2d:

‘In view of the language on the face of the card that “this is not an application for membership” and the language that in the alternative it is “for an NLRB election” we think there was a burden on the General Counsel to establish by a preponderance of the evidence that the signer of the card did, in effect, what he would have done by voting for the union in a Board election. We think that in refusing to consider this subjective intent of the signer of the card, in light of the ambiguity on the face of the card, the Board erred. Upon a careful examination of the record we conclude that the Trial Examiner correctly found that the designation cards signed by Rhodes and Wright were not valid designations for the union. We conclude that the Board’s finding to the contrary is not based on substantial evidence on the record as a whole.’

The court denied enforcement of the § 8(a)(5) charges. In so doing, it cited with approval *N.L.R.B. v. Koehler, supra*. In critical mood, Judge Tuttle stated at page 225:

‘It would be very simple for the union to prepare a card that in an unambiguous form would authorize union representation as a bargaining agent. If the union also wished to have cards signed to call an election this would also be a very simple matter. There can be little excuse for combining the two in a card that makes possible the misrepresentation that the Board found to have existed. . . .’

In the instant case the authorization card clearly and without ambiguity designated the Union as the employees' bargaining agent. The covering letter, however, is most ambiguous and most misleading. It could well be classified as intentional double-talk. The effect of the covering letter herein is no different from the effect of the authorization card in *Peterson Bros.*"

Such is undoubtedly the case here; indeed, the Union's misrepresentations here were more pronounced, more consistent and, clearly, every bit as effective.

Thus, in summary as to whether the Union had a majority at the critical time, we note again that the General Counsel presented 65 cards which, arguably, evidence exists in regard to their authenticity. As to many of these cards, however, their authenticity is in question in that it was supported solely upon the testimony of the General Counsel's handwriting expert. Since Petitioner was improperly and prejudicially prevented from adequately cross-examining that witness, we submit that many of these cards have not passed the test required and their use is precluded. *Cf. Maphis Chapman Corp. v. NLRB*, 368 F. 2d 298 (4th Cir., 1966).

In any event, in light of the gross and consistent misrepresentations, which, at best, can be called deliberate double-talk on the part of the Union, none of these cards can truly be said to represent the intent of the signators, particularly when not supported by independent evidence. The Trial Examiner's self-satisfying reasoning that "intelligent" employees could not be mislead is a sangfroid that excites our imagination but insults our intelligence.

At any rate, however, the 19 cards where specific misrepresentation was shown (*in addition* to the Union's

false and misleading written communications) must be subtracted from the 65 figure. In ascertaining whether the Union had a majority of the employees, to include in any such tabulation the cards of the most violent anti-union employees in the shop—who at all times stated they were signing solely to get the election over with—(Dellomes [R. T. 1359-1361; 1364-1366; 1667]; Christensen [R. T. 1458, line 18, to 1461, line 19; 1464, lines 6-17; 1465, line 3, to 1468, line 23]), as well as employees who were plainly concerned about the language of the card, inquired about same and were told by Union adherents and organizers that the card was merely to have an election or that all it would mean would be that they would be on the mailing list (Polony [R. T. 1372-1376]; Garrett [R. T. 1419-1421]), and employees who are recent immigrants to this country, in many cases can scarcely speak or understand English, converse in another tongue and whose ideas of unionization are based upon knowledge of union organization in foreign countries wherein the concept of having a union represent employees without an election is either anathema or inconceivable or both (Cheetham [R. T. 1410, line 3, to 1411, line 22; 1412, line 20, to 1413, line 23; 1418]; Cuda [R. T. 1501-1504]; Garger [R. T. 1518]; Homnan [R. T. 489-500]; Kofink [R. T. 780]; Kuhmann [R. T. 563-566; 1683]; Proudfoot [R. T. 480, line 12, to 481, line 16; 482, line 12, to 483, line 24; 876, lines 17-23; 1332, lines 16-21; 1534, line 3, to 1535, line 22]; Vogl [R. T. 555-556]; Robert Weymar [R. T. 522-523; 541]), and/or were individually led to believe that the purpose of the card was to have an election, is indefensible. As a consequence, *at the most*, only 46 cards withstand the burden of proof as to their authenticity *and* validity.

As indicated at the beginning of this argument, 114 names remain on G.C. Ex. 101 as being part of the

unit. The status of only one employee is in question. Thus, for the General Counsel to show that the Union had a majority at the critical time, he would have had to present and prove both the authenticity and validity of at least 57 employee cards. He has patently failed. The Union never had a true majority.¹⁴ Accordingly, the *Bernel Foam* doctrine cannot apply; at most, there should be a new election.

C. The Record Demonstrates That Petitioner Had a Good-Faith Doubt That the Union Represented a True Majority of Its Employees.

Assuming, without in any way conceding, that some violations of Section 8 are attributable to Petitioner and further assuming, purely *arguendo*, that the Union did represent a majority of its employees when such violations were allegedly committed, the Union still would not be entitled to an order acquiring Petitioner to bargain based on this record. A whole series of Board and Court decisions establish that an employer is obligated to honor the recognitional demand of a union only if it lacks a good faith doubt regarding the union's majority status. If such a good faith doubt exists the employer is privileged to insist upon a Board-conducted election. It is not only incumbent on the General Counsel, therefore, to prove a majority, and violations of Section 8 of the Act, to justify a bargaining order, but in addition to prove that the employer has re-

¹⁴As the Associate General Counsel of the Board, in reviewing the law on this field, has stated, unions who desire to rely on authorization cards as proof of their majority "would be well advised . . . in soliciting employees, not to make representations which might raise questions as to whether the signing employees freely and genuinely intended to designate the union as their collective bargaining representative." Gordon, "Union Authorization Cards and the Duty to Bargain", Daily Labor Report, 33, BNA, February 15, 1968.

fused recognition in bad faith. *Aaron Bros. of California*, 158 NLRB 1077 (1966); *Strydel, Inc.*, 156 NLRB No. 114 (1966); *Harvard Coated Products Co.*, 156 NLRB 4 (1966); *Hammond & Irving, Inc.*, 154 NLRB 84 (1965); *NLRB v. Johnnie's Poultry Co.*, 344 F. 2d 617 (8th Cir. 1965); *Don The Beachcomber v. NLRB*, 390 F. 2d 344 (9th Cir. 1968).

Moreover, when the employer, as here, establishes by uncontradicted evidence ample independent grounds for a good faith doubt it is not enough that the General Counsel merely counter with evidence of the commission of unfair labor practices. See *McQuay-Norris Mfg. Co.*, 157 NLRB 131 (1966), where the Board said:

“Not every act of misconduct necessarily vitiates the (company's) good-faith. For, there are some situations in which the violations of the Act are not directly inconsistent with a good-faith doubt that the union represents a majority of the employees.”

The Board added:

“The doctrine that an employer will not be heard to plead a good-faith doubt that his employees wish to be represented by a union when he has engaged in unfair labor practices at the same time that the union has been pressing its claims is not to be applied mechanically in all cases. It is not a *per se* doctrine. *It must at least appear that the unfair labor practices were committed in an effort to dissipate the union's majority, and that the unfair labor practices were in fact responsible for the loss of the union's majority.*” (Emphasis supplied)

For further explication of the Board's position, see *Hercules Packing Corp.*, 163 NLRB 35 (1967), *Monroe Manufacturing Co.*, 162 NLRB 8 (1966).

The Second Circuit, in *NLRB v. River Togs Inc.*, 382 F. 2d 198 (2nd Cir. 1967), placed the issue of good faith in proper and sharp focus. There, as here, the treatment of the good faith issue both by the Trial Examiner and the Board panel was cursory. There, as here, the Board merely referred to an extensive anti-union campaign and found without further discussion that the company's failure to accord recognition was grounded upon a desire to thwart unionization.

On the other hand, the Court analyzed the good faith issue at some length:

"... We see no logical basis for the view that substantial evidence of good-faith doubt is negated solely by an employer's desire to thwart unionization either by proper or even by improper means. [The employer] had much reason to doubt the Union's claim to a valid majority. . . . His efforts to counter the Union, . . . were 'as consistent with a desire to prevent the acquisition of majority status as with a purpose to destroy a existing majority.' *Lesnick, supra*, 65 Mich. L. Rev. at 855. As Judge Learned Hand said in a similar context, his response 'however unlawful in itself it may have been, throws substantially no light on how far he thought the effort had succeeded to form a union. As a penalty it might be proper, but as a link in reasoning it seems to us immaterial.' *NLRB v. James Thompson & Co. supra*, 208 F.2d at 746."

Numerous recent Circuit cases have similarly questioned the probative value of contemporaneous unfair labor practices in determining an employer's good-faith doubt. A good-faith doubt has been sustained and a Section 8(a)(5) violation rejected consistently in these

cases even though the employer committed violations of the Act during the union election campaign. *Textile Workers Union v. NLRB*, 380 F. 2d 292 (2nd Cir., 1967); *NLRB v. Johnnie's Poultry Co.*, 344 F. 2d 617 (8th Cir., 1965); *NLRB v. Flomatic Corp.*, 347 F. 2d 74 (2nd Cir., 1965); *Lane Drug Co. v. NLRB*, F. 2d (6th Cir., 1968); *NLRB v. Shelby Manufacturing Company*, 390 F. 2d 595 (6th Cir., 1968); *NLRB v. Morris Novelty Co.*, 378 F. 2d 1000 (8th Cir., 1967).

The closely analogous decision of *Peoples Service Drug Stores, Inc. v. NLRB*, 375 F. 2d 551 (6th Cir., 1967) established guidelines which are appropriate and realistic and should apply in the instant case. There the Board found the employer had engaged in some 14 violations of Section 8(a)(1)! The Court sustained a majority of these findings. Nonetheless, it found no support for an 8(a)(5) finding:

“The specific question before us is whether there was substantial evidence to support the finding of the Trial Examiner that there was no foundation for Peoples’ alleged doubt that the union had a majority of its employees who desired representation by the union. The mere fact that Peoples was guilty of unfair labor practices in connection with the union organizational campaign is not sufficient in and of itself to negative a doubt on the part of management. [Citing cases.]

“A significant number of employees testified that they signed the cards believing that their only effect would be to require a secret election under the auspices of the NLRB. Some employees testified that union organizers and fellow employees solicited union membership, stating that the effect of signing the authorization cards would be to se-

cure an election in which they would be free to vote for or against the union. The union and its organizers did not make known to all the employees that by presenting cards from a majority of Peoples' employees they could obtain recognition without an election. It appears from the testimony of a significant number of employees that they were misled by union organizers or fellow employees acting on behalf of the union into believing that the only purpose of signing the cards was to obtain an election. An important factor to be considered in determining whether an employer entertained a good faith doubt as to the union's majority status is whether the union misrepresented the purpose of the cards to the employees.

'The decisions of the Board as well as the opinions of the courts place more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards. If in fact misrepresentations are made by the union to employees to the effect that the only purpose of the card is to authorize the union to petition the Board for an election, the card will not be construed to authorize representation, even though it contains language to that effect. [citing cases]

". . . The Examiner says that the widespread coercion indulged in by Peoples compels the conclusion that the advocacy of an election was a device to undermine the Union and to gain time and that its expressed doubt as to a majority was not made in good faith. This is pure supposition and, unlike *NLRB v. Cumberland Shoe Corporation*, *supra*, we do not find evidence to support such an inference.

“The Examiner discredits Mr. Weaver’s reasons for doubt. The Examiner assumes that the employees who told management that their cards did not represent their true intentions, did so to avoid the displeasure of their employer. It may as well be assumed that they were pressured into signing by fellow employees and union representatives. *This is not a criminal case where Mr. Weaver must be persuaded beyond a reasonable doubt. An honest doubt is all that is required. A doubt in the mind of an individual is a subjective matter and cannot be precisely determined. While the absence of a doubt may be proved by circumstantial evidence, we conclude that, under the facts of this case, the Examiner’s finding that Mr. Weaver, on behalf of Peoples, did not have a good-faith doubt is not supported by substantial evidence.*” (Emphasis added).

The instant case cannot be distinguished from that just cited. If anything, it presents a stronger set of facts.

Assuming, *arguendo*, that the Trial Examiner correctly found that Petitioner violated Sections 8(a)(1) and (2)—and his finding of bad faith was bottomed entirely upon violations of these particular Sections of the Act [C. T. 30]—such violations, at best, were more technical than coercive. Most of the conduct alleged (but hardly proven) was either of an isolated nature or was drawn from statements in campaign literature that were, at the most, of a kind so close to the borderline of free speech that it cannot be ascertained whether they were violative of the Act or protected by it. See, *e.g.*, *NLRB v. TRW Semiconductors, Inc.*, 385 F. 2d 753 (9th Cir., 1967). Such acts of misconduct sparingly committed do not destroy Petitioner’s good faith when all factors are considered.

To establish Petitioner's good faith doubt in proper perspective, we shall portray the sequence of events leading to that doubt. The entire picture provides a basis not only for a good faith doubt but gave Petitioner every reason to be *virtually certain* that the Union did not have a majority at the time of its demand or at any time prior thereto. Attached to this brief is Appendix "B," a detailed list of all the pertinent and multitudinous transcript references depicting the undenied fact that virtually all Petitioner's employees had a practice of freely offering information to Petitioner regarding the Union. The nature of this friendly and personal employer-employee relationship was instrumental in producing Petitioner's good faith doubt and served as an objective basis for the compilation of Petitioner's survey, R. Empl. Ex. 7, *infra*.¹⁵

¹⁵In addition, there is considerable uncontradicted testimony that Union adherents were told by management representatives that participation in union activities was their right and privilege. See, *e.g.*, testimony *re* Burke [R. T. 1658-1659]; Cheetham [R. T. 1410-1411, 777!]; Crandall [R. T. 1672]; Christopher [R. T. 1689-1690] and Rawl [R. T. 1687-1688]. Management officials also reprimanded, at least on one occasion, employees who were against the Union for physically threatening employees who were in favor of the Union [R. T. 1319-1320]. And throughout the entire preelection campaign, Petitioner voluntarily made available to the Union a large bulletin board which enabled the Union to put up numerous announcements and campaign propaganda right in the middle of Petitioner's plant [R. T. 821-822].

Moreover, anti-union employees were as vocal as avid Union supporters. See, *e.g.*, testimony of Addison [R. T. 1491]; Burns [R. T. 1524-1525; 1593]; Pashone [R. T. 1508-1509]; Poirier [R. T. 1532-1533]; Whiteman [R. T. 1435-1436]; Fehland [R. T. 1397-1398]. A number of employees announced to Petitioner's officials that if the Union got in, they would quit their jobs. See Clendenin [R. T. 1669-1671]; Delomes [R. T. 1359]; Gardner [R. T. 1598]; Hibbard [R. T. 787; 1735-1736]; Kuhmann [R. T. 786] and Meyer [R. T. 1686-1687].

All of this evidence supporting good faith was conveniently ignored by the Board.

Petitioner was first made aware of general union activity in the industry late in 1964, through an article in a local newspaper concerning the UAW's organizational efforts in the tool and die industry in Southern California. During this period of time, other articles appeared in newspapers publicizing that organization's drive, but there was no Union activity at Petitioner's plant [R. T. 753; 901-930].

The first indication of Union activity in the plant was on February 22, 1965, when Weitzel, Petitioner's president, informed Fink, its general manager, that he, Weitzel, had received an anonymous phone call from a woman telling him of Union organization or activity in the plant [R. T. 765-766; 909-910]. Fink, in turn, called Bob Howland, plant superintendent, into his office and told him what Weitzel had said about the call [R. T. 757-758; 910-911]. Howland testified that thereafter beginning around February 22 to 24, 1965, many employees began asking him questions concerning the Union [R. T. 1218].

Both Fink and Howland testified that on or about March 3, 1965, Howland gave to Fink a copy of R. Empl. Ex. 4 [R. T. 758; 1156] and on or about March 12 a copy of R. Empl. Ex. 5, Union campaign material [R. T. 759-760; 1156-1157]. Howland found both of these copies around the shop [R. T. 1295]. The documents both allude to a Board election.

On the morning of March 15, 1965, a Monday morning, between 7:00 and 8:00 A.M., Howard Berno, whom the Trial Examiner found to be a regular employee [C. T. 35, line 3], came into Fink's office, as he and other employees frequently had done in the past. Berno informed Fink that he had attended a Union meeting the previous day (March 14th) as he, Berno, wanted to know more about the Union and to be further informed

[R. T. 771; R. T. 852-853; R. T. 1125-1126; R. T. 1777-1779].

Berno informed Fink that a union agent, Sloane, had spoken there and said there was going to be "a petition for an election." He gave Fink a copy of R. Empl. Ex. 6 that had been distributed to the employees. Berno also told Fink that some employees there had told him that they had gone to the meeting merely to get information and were not for the Union [R. T. 770-773; 852-853; R. T. 1723-1726; 1777-1779].

As soon as Berno left the office, Fink called Howland in and repeated what Berno had stated [R. T. 1773; R. T. 855; R. T. 922-923; R. T. 1157]. Fink asked Howland's opinion about the matter and Howland said that based upon his numerous conversations with employees, leadmen and supervisors, he, Howland, did not believe the Union had "enough people for a petition for an election." [R. T. 773-774; 854-855; R. T. 1157-1158; 1220-1222]. Fink asked Howland to return to his office that evening to discuss the matter further [R. T. 773-774; 853; R. T. 1157].

At that point, Howland, in order to verify his opinion that the Union did not have a majority, went to Berno, and told him to prepare a list of direct personnel and maintenance employees, as Howland wished to prepare a survey of Union strength. He instructed Berno to leave room on the right-hand side of this list to put "for" or "against" [R. T. 1158-1160; 1221-1223; R. T. 1727]. During the rest of the morning, Berno, in addition to his other duties, prepared R. Empl. Ex. 7 (minus the handwriting on the right-hand side under the column "for" or "against" the Union, and other written notations.) Berno, himself, without instructions from Howland, put on the R. Empl. Ex. 7, an asterisk beside the names of certain employees because

Berno thought that Howland would be interested in knowing how many employees attended the meeting the day before. After lunch he gave Howland copies of the list [R. T. 1158-1161; R. T. 1727; 1747-1749].

That afternoon, for approximately two or three hours, off and on, Howland filled in the column designed "for" or "against" the Union by marking down thereon beside each of the employees listed his opinion as to whether the employee was for or against the Union or was undecided [R. T. 1161; 1235-1236]. He made the tally from his recollection of prior conversations with employees and leadmen and others. During the day, he spoke to certain supervisors and lead personnel and asked their opinion on particular employees about whom Howland felt he needed more information [R. T. 1222-1224; R. T. 1295-1298].

That evening, Howland met with Fink in the latter's office and brought with him R. Empl. Ex. 7 which now contained Howland's designations. Fink never knew of the existence of this document before Howland brought it into his office that evening [R. T. 774; R. T. 888]. The list contained all of the names of employees Howland thought would be voting, *i.e.*, the skilled people [R. T. 774; R. T. 898-899; R. T. 1161]. The testimony also shows that the small notations (principally the word "no") beside various employees' names, were put in by Fink himself during the next three or four days [R. T. 775-776].

There was and is no question as to the authenticity of R. Empl. Ex. 7 nor the purpose for which it was prepared. Fink, Howland and Berno all testified consistently and without any contradiction as to its proper purpose and the manner in which it came into being. The results depicted by R. Empl. Ex. 7 show beyond peradventure both the good faith approach and doubt of

Petitioner. Try as did the counsel for the General Counsel and the charging party to undermine the veracity of R. Empl. Ex. 7, it remains proof positive that as of March 15th, *the day prior to receipt of the Union's demand letter*, Petitioner clearly believed that a majority of employees were not in favor of the Union.

While, the Trial Examiner ignored virtually all the above evidence, it is important to note, that he did *not* discredit R. Empl. Ex. 7 or the evidence from which that exhibit had been derived.

Petitioner's estimation of the sentiments of each and every employee there considered, together with all supporting evidence is incorporated as Appendix "C" to this brief. This breakdown and the data which engendered it is perhaps the most significant evidence of the entire case. Research has uncovered no other case where the objectivity of an employer in formulating a good faith doubt has been more clearly established. The evidence was never denied. It was never contradicted. Although unaccountably tossed aside by the Board, it leaves no doubt that the Petitioner had a good faith doubt as to the Union's alleged majority. The Fink-Howland conclusion arrived at on the evening of March 15, and further reiterated over the next few days, that the Union "obviously did not have a majority" is fully supported on the record and was a conclusion that was arithmetically sound and founded upon good faith [R. T. 789-790; R. T. 925; R. T. 1172].

Indeed, a careful analysis and computation of the appended evidence shows that of the 113-114 employees stipulated to be in the unit the union would have needed 57 or 58 employees for a majority. But the evidence shows that *no less than 59 employees had come out openly against the Union*. These employees—and in virtually every case the evidence is without contradiction—had freely and openly communicated this to the Petitioner,

through its supervisors, leadmen and others.¹⁶ In addition, another ten employees had let management know, near the beginning of March, that they were undecided about the Union.¹⁷

Nearly half of the listed employees personally testified in support of Petitioner's conclusions. Moreover, another half dozen employees had vacillated, indicating on one or more occasions opposition to the Union, while at other times seeming to favor it.¹⁸ Some fifteen employees gave no indication of their position—some were on sick leave, others had only recently been hired or could scarcely read or write.¹⁹ So there were only between 24 and 28 employees who had indicated (either directly, by association with other employees, or sanguinity) their support of the Union's drive. Interestingly enough, 21 employees who signed cards clearly indicated to Petitioner they were against the Union while another 8 employees who signed cards indicated that they were undecided.²⁰

¹⁶Addison, Amthor, Berno, Booze, Bradley, Burns, Chavez, Cheetham, Christenson, Clendenin, Dale, Dellomes, Estrada, Fehland, Freeze, Gardner, Garrett, Gowen, Grice, Hibbard, Hoef, Hunt, Kevelighan, Kimura, Knoles, Kocsis, Kofink, Kruse, Kuhmann, Lamb (Harold), Lary, Lawrence, Letts, Mancini, Mansfield, Moran, Morris, Meyer, Newak, Pashone, Poirier, Polony, Proudfoot, Rhedin, Riegler, Schlapp, Scoggins, Scovel, Senyk, Seymour, Smith, Stow, Thomas, Vogl, Watts, Whiteman, Williams, Zadnik, Zirbel.

Not included in the total 59 employees who clearly stated their opposition to the Union, Fink and Howland also were told by the leadmen, later at the hearing stipulated as supervisors within the meaning of the Act, that they were against the Union. On March 15, neither Fink nor Howland knew the legal status of Negret, Woods, Zeman, Lawler, or Payton.

¹⁷Anothaiwongs, Cisneros, A. Crandall, D. Doebler, Gumm, Mellone, Osdale, Thiekotter, Virgil, U. Weymar.

¹⁸Conner, Gedminas, Gumm, Hirschmann, T. Klein, Herbert Lamb.

¹⁹Boone, Cuda, F. Doebler, Dominguez, Dufek, Ganske, Garger, Harrison, Hinsch, Homnan, Howard, Kojaku, O'Kane, Twardowski, Wiley.

²⁰Amthor, Booze, Cheetham, Christenson, Dellomes, Estrada, Garrett, Hoef, Knoles, Kofink, Kuhmann, Lawrence, Polony,
(This footnote is continued on the next page)

The record shows that *in at least 95 percent of the cases*, the conversations and employee statements communicated to Petitioner upon which it premised its good faith doubt occurred prior to March 8, that is, prior to the alleged commission of virtually all the alleged violations of the Act.²¹

Violations of the Act, even if they occurred and were committed, as the Board found, “to dilute whatever interest in the Union had been engendered among its employees [C. T. 30, lines 26-27] or if they “bespoke” a fear that the Union was achieving some measure of success in its organizing goals” [C. T. 30, lines 37-38] or if Petitioner “saw the union as a threat to its way of dealing with its employees” [C. T. 30, lines 58-59], in no way negate that doubt, once established. Such violations are absolutely irrelevant to the issue, once independent grounds for doubt are established, because they are, “just as consistent with a disbelief in the majority status of a union as [they are] with a belief in the majority status.”²² *Lane Drug Co. v. NLRB*, F. 2d (6th Cir. 1968); *NLRB v. S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967); *NLRB v. River Togs, Inc.*, 382 F. 2d 198, 207 (2d Cir. 1967). Thus, the Board’s conclusion is without ma-

Proudfoot, Rhedin, Scoggins, Seymour, Smith, Vogl, Williams, Zirbel, Also, Anothaiwongs, Cisneros, A. Crandall, D. Doebler, Osdale, Thiekotter, Virgil, U. Weymar.

²¹In this connection there is completely absent from the Trial Examiner’s decision any *finding* that the alleged unfair labor practices dissipated the alleged union majority.

²²Indeed, the record discloses only one instance of an employee changing his mind because of the actions of any outside party. That was Kuhmann who changed in favor of Petitioner because he learned of Union seniority policy from someone outside the plant. [R. T. 564, line 1, to 565, line 6; 566, line 16, to 568, line 9]. Other employees who had signed cards indicated that the more the Union adherents campaigned, the less they favored the Union. See, *e.g.*, Booze [R. T. 1428, lines 3-15]; Cheetham [R. T. 1416, lines 3-22]; Kofink [R. T. 1575, lines 11-25]. See also R. T. 1579.

terial supporting evidence in this record, and it follows, therefore, that *Bernel Foam* rationale is inapplicable.

Even beyond this, Petitioner's position of doubt did not rest solely upon arithmetic, but also on the advice of experienced labor counsel. On March 16, the day following the meeting between Howland and Fink, Petitioner received the Union's demand letter [G.C. Ex. 38]. Fink immediately contacted Carl Gould of Hill, Farrer & Burrill, Petitioner's attorneys [R. T. 790, lines 11-21]. Fink, Howland, Gould and Weitzel met in Weitzel's office that evening [R. T. 1173, lines 12-25; 790, line 22, to 791, line 1].

Gould read G.C. Ex. 38 given to him by Fink and then asked Fink and Howland their opinion of the matter. Fink handed Gould R. Empl. Ex. 7, their survey, together with Union literature, R. Empl. Exs. 4, 5 and 6. Fink told Gould of many of the conversations that he, Howland, and others had with employees and how the survey had been prepared [R. T. 998, line 16, to 999, line 4; R. T. 1174, line 2, to 1175, line 7].

Gould read R. Empl. Exs. 4, 5 and 6, which pointedly and decidedly told Petitioner's employees of the aim of the Union: to gain an election. Both Fink and Howland told him of particular instances and the general atmosphere in the plant of employees believing that the entire thrust of the Union's organizational drive was for an election. Taking this evidence before him, Gould advised Fink and Howland that if the Union did have a majority of signed authorization cards, they were obtained through misrepresentation and the consistent barrage of Union propaganda to convince the employees that there would be an election.²³ Gould

²³Gould was aware of two other factors which he weighed before advising Petitioner. One, the plant was a virtual United
(This footnote is continued on the next page)

concluded that the Union did not have an uncoerced majority and advised that it would be illegal for Petitioner to recognize the Union as the collective bargaining representative of its employees without an election. Accordingly, Petitioner sent G.C. Ex. 39, dated March 19, to the Union, refusing its demand for recognition [R. T. 791, line 12, to 794, line 14; 886, line 16, to 888, line 18; 929, lines 24, to 934, line 5; 950, line 9, to 959, line 12; 994, line 19, to 999, line 4; 1174, line 1, to 1175, line 19].

Under the above circumstances, Petitioner had no duty whatsoever to recognize the Union; on the contrary, it had a duty *not* to recognize the Union: to have done so would have violated the rights of its employees and Section 8(a)(1) and (2) of the Act. *International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 739 (1961).

In *Nahas Department Store No. 3*, 58 LRRM 1687 (1965), the Board adopted the Trial Examiner's recommendation that a complaint, containing an 8(a)(5) allegation, be dismissed. The Trial Examiner in that case stated, in language quite apposite here:

“Upon all the evidence which is ample on this point, I find it also clear that at all times the Company had a good faith doubt that the Union possessed majority status in the unit. The testimony of Nansel and Nuss demonstrates conclusively that more than half the employees in the unit at various times had complained to them

Nations with employees recently arrived from among other countries. Germany, Italy, Mexico, Thailand, Japan, Austria, France, Czechoslovakia, England and Canada. While proficient craftsmen, their knowledge either of the English language or American unionization, or both, was limited and they could be more easily misled. Too, Gould was advised, and it is true, that the Union was pressuring employees to sign authorization cards even after it had made its demand for recognition, which led him to seriously question whether the Union really had a majority of cards.

about 'being bothered' by the organizers, or had stated that they were not interested in the Union. Furthermore, some employees who had signed cards stated to Company officials that they thought the cards were merely for an election, which they considered an advantageous way of ending the Union's solicitation. Furthermore, the feverish activity of the Union agents in making solicitations in the store, long after the Union had claimed a majority, contributed to the decision of Nuss and Nansel that the Union, knowing what it did as evidenced in this record, the Company would have committed an unfair labor practice because it could not claim that it was unaware that the Union's claim of majority status was false. To have recognized the Union, under the circumstances here present, would have been most dangerous and foolhardy. Therefore, I find, that at all times from the date of the Union's demand for recognition until the date of the hearing the Company had a good faith doubt of the Union's majority status in the appropriate unit. (TXD - (S.F.) - 28-65, p. 16, l. 45 - p. 17, l. 5)"

Of note is that Petitioner's counsel, Gould, was attorney for Nahas in the cited case.

In sum, the Board has seriously erred in disregarding Petitioner's uncontradicted evidence that doubt of a true Union majority was founded in a good faith attempt to calculate employee sentiment and on advice of competent counsel, in favor of erroneous and, even more, irrelevant findings that certain unfair labor practices occurred in the preelection period. This Court should, therefore, deny that portion of the Board's order which would require Petitioner to bargain with the Union on this further ground.

PART 2.

THERE IS NO SUBSTANTIAL EVIDENTARY SUPPORT FOR FINDINGS THAT PETITIONER COMMITTED ANY UNFAIR LABOR PRACTICES.

The record reflects that during the period prior to the election, held in June 1965, both parties, Company and Union, conducted an aggressive campaign for employee votes. For its part, the Union initiated numerous organizational meetings and talks with employees, distributed an estimated 20-25 pieces of pro-Union literature through the mail and posted another 30-40 pieces of propaganda on the Union's side of the Company bulletin board [R. T. 821-822]. In turn, Petitioner likewise mounted a hard-hitting campaign, but one well within the limits of law and therefore protected, as the evidence amply demonstrates. The courts have emphasized repeatedly that an aggressive and partisan campaign on the part of an employer may not by itself be considered as evidence, either direct or indirect, or wrongful activity by the employer *Super-nant Mfg. Co. v. NLRB*, 341 F. 2d 756, 759-60 (6th Cir., 1965); *Hendrix Mfg. Co. v. NLRB*, 321 F. 2d 100, 103 (5th Cir., 1963).

A. Purported Section 8(a)(1) Violations.

(1) Alleged Questioning in "Context of Threats".

The Board adopted without comment its Trial Examiner's finding that Petitioner had contravened Section 8(a)(1) for having, "questioned some of its employees concerning their interest in the Union and that because some of this questioning was in a context of threats that a union might force the [Petitioner] out of business it constituted interference, restraint and coercion of employees . . .". [C. T. 32, lines 19-23];

and for “attempting to induce the fear that the selection of the Union would result in the closing of the business and the loss of employment, and by using the device of wage increases the [Petitioner] tried to frighten cozen, and allure the employees away from choosing the Union as bargaining representative.” [C. T. 32, lines 40-44].

It is well established that there is no unfair labor practice when an employer questions employees concerning their interest in unions unless that questioning is coercive; that is, unless it contains a promise of benefit or threat of reprisal. Indeed, a questioning of interest, without more, is free speech protected by Section 8(c) of the Act. *Lane Drug Co. v. NLRB*, F. 2d (6th Cir., 1968); *Bourne Co. v. NLRB*, 332 F. 2d 47 (2d Cir., 1964). This court has rightfully pointed out in *Don The Beachcomber v. NLRB*, 390 F. 2d 344 (9th Cir., 1968) that,

“Often the only manner in which an employer can support his good-faith doubt of union majority is by investigation. As long as his inquiry is not undertaken in a threatening manner, either open or implied, such an attempt to avert §8(a)(5) charges should not without more render an employer subject to attack under §8(a)(1).”

Further, a review of the various conversations referred to by the Trial Examiner discloses that in each instance one or a combination of the following factors were present to support their legality: (1) union information was volunteered by an employee, rather than solicited; (2) the talks took place in a casual and friendly context, absent threats and coercion; (3) the alleged questioning was conducted by an individual who was not aligned with management and for whose con-

duct it shared no responsibility.²⁴ See *NLRB v. Morris Novelty Co.*, 378 F. 2d 1000 (8th Cir., 1967).

The Board, adopting its Trial Examiner's view, agreed that these conversations, standing alone, did not amount to illegal activity. That is, *nothing said in the conversations themselves* was held to be a violation of Section 8(a)(1). The alleged vice was that the "questioning" took place in a surrounding "context of threats that a union might force [Petitioner] out of business." [C. T. 32, lines 19-23]. The Board discovers the foundation for this "context" in certain specified pieces of campaign literature distributed and speeches made by Petitioner during the pre-election period [C. T. 27, lines 20-28, line 63].

Particular emphasis is placed on literature which stressed that three other area tool and die shops, Falco, Mars and Alba, had discontinued operations shortly after

²⁴Space limitations preclude the detailing here of each such episode. The Court is respectfully referred to the following excerpts from the Reporter's Transcript which contain the testimony concerning the conversations upon which the Trial Examiner apparently grounded his findings: Cantrell-Fink, R. T. 121-123, 761-763 (Information volunteered—no threats or promises.); Berno-Schwartz-Cantrell, R. T. 1729-1751, 126 (Alleged questioning by Schwartz who was a visiting university professor not employed by or acting for Petitioner.) Klein-Howland, R. T. 274-275, 1112 (No question relating to union sympathy at all. Merely a noncoercive general query as to how a union could benefit Petitioner.); Reigler-Isak, R. T. 1562, lines 3-6, 1563, 1394-1395 (Question in native tongue to longtime German friend as to how he felt about the Union at a time when questioner was not even employed by Petitioner.); Virgil-Berno, R. T. 367, line 19, to 369, line 9, 370 (No questioning at all about union feelings—a conversation had *a year later*—in 1966—concerning whether Virgil knew union could get into plant without an election.); Ahlstrom-Howland, R. T. 405, 393, 1138-1139 (Both men testified their conversations were always conducted in a friendly and joking atmosphere.); Booze-Howland, R. T. 1428, line 13, to 1431, line 7 (No recall by employee Booze as to whether union information was volunteered or solicited and no coercion whatsoever.)

being organized by unions. Thus, an undated communication [G.C. Ex. 9] pointed to the Falco Tool & Die situation and stated that union promises to employees, like company promises, “depend on the ability of the company to continue in business and make a profit,” and that because the company without a union could guarantee uninterrupted production and delivery to customers employee job security was every bit as good without, as with, a union contract [C. T. 27, lines 27-39].²⁵

A subsequent letter to employees by General Manager Fink, dated May 12, again referred to Alba, Falco and Mars’ inability to continue in business after the advent of a union [C. T. 27, lines 44-51; G.C. Ex. 14; R. T. 894]. The above communications were supplemented by a subsequent letter from W. Lee Campbell, Petitioner’s Regional Sales Manager [G.C. Ex. 15] which touched upon potential concerns of customers about strikes, the meeting of production schedules and higher charges if the union campaign succeeded [C. T. 27, line 53, to 25, line 8].

Finally, on June 8, Falco’s former President, Alex Skulsky, wrote a letter distributed to employees stating that Falco had prospered until a union was introduced into the plant and further relaying his feeling that a union was not needed and would cause disruption in operations [C. T. 28, lines 10-28].²⁶

²⁵The Trial Examiner, notably first rejected G.C. Ex. 9 entirely [R. T. 722], then later received it only because of a statement in Answer 4 therein concerning seniority as related to Cantrell’s discharge [R. T. 817, lines 22-25]. Yet answer 25 is quoted and stigmatized in his decision.

²⁶Other references by the Trial Examiner to a June 8 letter of Fink’s concerning the possibility of strikes, and to a June 10 speech of Weitzel’s stating that problems could be resolved without a union, and asking for a personal vote of confidence [R. T. 28, lines 30-63] are not dealt with here, for they obviously contain no objectionable material and do not appear to have been relied upon to support the alleged theme of plant closure.

We first note that the timing of the communication of the Falco-Mars-Alba story was such that the Union had ample opportunity to reply or rebut it in any appropriate fashion. Its failure to do so reinforces the fact that Petitioner's assertions were true. Much more importantly, these communications were perfectly proper and constituted legitimate campaigning on the part of the employer. The Board has totally failed to grasp the crucial distinction here between illegal "threats" and lawful "predictions." This distinction has been carefully delineated in several thoughtful Board and Court cases decided since the one at bar arose.

For example, in *National Food Stores Inc.*, 169 NLRB No. 12 (1968), the Board, overruling its Trial Examiner, held that a pre-election letter and speeches which urged that the union was only interested in dues, and stressed, as the effects of unionization, strikes, violence, loss of benefits and plant closure were not coercive.

Southwire Co. v. NLRB, 383 F. 2d 235 (5th Cir., 1967) provides an enlightened court analysis of Section 8(c).²⁷ After first recognizing that there can be no unfair labor practice absent a threat of reprisal or promise of benefit and that both sides to a labor dispute have the right, arising under the First Amendment, to express opinions, the Court said:

"The law has developed in this area to distinguish between a threat of action which the employer can impose or control and a prediction as to an event over which the employer has no control. The threat is not privileged but the prediction is."

²⁷Section 8(c) reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

We may properly inquire what threat of reprisal is contained in the literature and speeches quoted by the Board? Nothing there states that Petitioner would close its doors in the event of a union victory. On the contrary, excerpts from President Weitzel's talk of June 10 and Fink's letter of June 8, *not mentioned by the Board*, illustrate that Petitioner had no intention of discontinuing operations. Thus, Weitzel said:

"I believe that this company has a great future ahead, and I expect to devote the rest of my life in the best interests of Mechanical Specialties Company." [G.C. Ex. 19, p. 2].

Fink's letter contained this sentence,

"Let us all continue working together to keep our plant operating 'full bent' on a friendly, cooperative basis." [G.C. Ex. 17].

Viewing this campaign material in its entirety, it consisted of no more than predictions of what the union might or could do. Unsound union demands, unfounded grievances, union-caused inefficiency, strikes and their attendant dislocation of production and delivery schedules—all were the predicted causes of possible monetary job loss—each factor under the sole control of the Union, not the Company.

Virtually an identical situation was presented to this court in *NLRB v. TRW-Semiconductors, Inc.*, 385 F. 2d 753 (9th Cir., 1967). In words applying with equal force to the case at bar this Court said:

"There is no suggestion [in employer literature] that the employer will reduce benefits or cut jobs if the employees vote for the union. *The prediction is that the union may or will cause such losses through strikes. There is also a prediction that the union's presence may or will cause loss of customers, to the possible or even probable det-*

riment of employees. Such arguments, too, are protected by Section 8(c)." (citations omitted) (Emphasis supplied).

and further on:

"The mere fact that campaign propaganda may induce fear—and be intended to induce fear—does not deprive it of the protection of Section 8(c). That is often the nature of campaign propaganda."

"Section 8(c) does not protect only those views, arguments or opinions that are correct, nor does it forbid them because they are demonstrably incorrect. The remedy is for the union to answer them, not a cease and desist order."

And see exhaustive discussion of the case development of Section 8(c) set forth in *NLRB v. The Golub Corporation*, 388 F. 2d 921 (2nd Cir., 1967).

There can be no other conclusion, applying this authority, than that Petitioner's campaign statements were predictions, not threats, and, as such, privileged. When this erroneous finding of the Board falls, there collapses with it the threatening "context", the alleged existence of which was used by Respondent to stigmatize Petitioner's conversations with employees. Not only then is the pre-election literature vindicated but the instances of so-called questioning are rendered perfectly proper as well.

(2) The Wage Increase.

The Trial Examiner further found that a wage increase given by Petitioner on March 8, prior to the Union's demand for recognition, violated Section 8(a)-(1). This, even though there was presented to Petitioner at that time no question concerning representation and despite the Examiner's own all but bewildering statement that "it was [Petitioner's] right to review its wage structure at any time it chose to do so and to take

whatever action it thought best." [C. T. 30, lines 17-18].

Consideration of the oral and documentary evidence reveals that the wage increase was (1) granted for economic reasons, (2) given in accordance with long-established practice, in the same manner as usual, and (3) decided upon well prior to the advent of any significant union activity.

The Board accepted the testimony of Howland, Fink and Weitzel that the subject of the wage survey came up first in December 1964 when Howland reported that certain competitors were paying higher wages than Petitioner in various job classifications. At the time the survey was initiated there was concededly no evidence that the union was interested in or intended to try to organize Petitioner's employees. Since it was company practice to remain even or above its competition, Weitzel compiled and transmitted to Fink documentary wage data in mid-February, 1965 [R. T. 840-841; R. Ex. 18]. This exhibit confirms that the company rate was low in significant areas [R. T. 841-843]. Fink immediately decided to, and did, increase the top rate for job classifications and then advised Howland to recommend individual increases [R. T. 843-844; 897-898].

As the Trial Examiner states, "within a few days, according to Fink, in consultation with Superintendent Howland, a number of wage increases were decided upon" [C. T. 24, lines 52-54]. There was still no notice of significant union activity even *after* the survey had been completed nor at the time the new top rate classifications were decided upon and individual increases determined.

The Examiner's subsequent statement that, "Before the increases were announced *or even finally decided upon*" a February 28 area-wide union meeting (at-

tended by *some* of Petitioner's employees) was held [C. T. 24, lines 57-60], finds absolutely no evidentiary support and directly contradicts his preceding finding that the wage increases were decided within a "few days" of mid-February—well before the union meeting.

It is true that at the time the increases were actually handed out, March 8, 1965, there was knowledge of some Union activity at the plant, but certainly no awareness of its *extent*. Indeed, at that time there was no indication that more than a very few had any interest in the Union. Combine with this the conceded absence of any union demand for recognition or petition for an election and it is obvious that the Board's 8(a)(1) finding is the product of the prejudicial and mistaken application of hindsight.

The economic reasons proffered by Petitioner for the increase were fully supported by the wage survey [R. Empl. Ex. 18] and never contested by the General Counsel. The Board has substituted for this concrete evidence of lawful motivation mere inference—that the increase *must* have been illegally motivated because of its proximity to the union's demand. But surmise will not, and cannot, support an unfair labor practice finding.

The evidence shows that the motivating factor for the wage raise was completely extraneous to any organizing activity, and the manner in which the wage increase was initiated and decided upon was in complete accord with Company prior and subsequent policy and practice [R. T. 938-942; R. Empl. Ex. 10]. In this regard Howland testified that top rate increases had always been the result of a survey, similar to the one conducted in February 1965 [R. T. 1145-1148]. He further stated that the number of merit increases will vary from year to year, but that the approximately 45 to 50 increases in 1965 were well within the normal

range. Previously the company had given as many as 80 merit increases at one time and there was even an instance where “. . . along with the top rate increases . . . approximately everybody got a merit increase at that time.” [R. T. 1148-1149; 1151]. Thus, Petitioner was doing what it had done in previous years in order to remain competitive [R. T. 1298-1308]. Indeed its failure to do so could well have resulted in an unfair labor practice finding on the theory that the increase was withheld on account of union activity.

— The Board has itself recognized that the mere coincidence in time between a wage increase and union activity is insufficient to support an inference of illegal purpose. In *Werthan Bag Corp.*, 167 NLRB No. 3 (1967) the Board said:

“During the organizational campaign, the employer posted a notice that there would be a wage increase. Following the notice, the employer notified each employee of his new rate. The employer did not violate the Act by the granting of the wage increase, since the employer’s first assurances of a wage increase preceded the outbreak of any union activity among the employees. *Also, prior to the union campaign, a wage increase was under consideration within the employer’s industry in view of government guidelines for a wage increase. Finally, at the time of the increase, other employers within the industry had recently granted increase.*” (Emphasis supplied).

The circumstances which dictated the Board’s decision in the above-cited case are the same as those present here. Surely the Petitioner was entitled to follow its practice of matching competitive wages, especially where its initial decision to do so was reached *prior* to employer knowledge of any union activity and its final decision was made when only minimal activity was

known to it. The fact that the union subsequently demanded recognition and petitioned for an election should not be retroactively applied to stigmatize Petitioner's motivation for the increase.

B. Alleged 8(a)(2) Violation—The Grievance Committee.

The Trial Examiner also found, and the Board agreed, that Petitioner dominated and interfered with the formation and administration of a grievance committee in violation of Section 8(a)(2) [C. T. 39, lines 10-13]. An examination of the facts reveals that on March 9, 1965, when President Weitzel suggested that employees select representatives and meet periodically with management to air any problems, the company firmly believed, and had every reason to believe, that the vast majority of employees did *not* want a union to represent them. The reasons for this belief are set forth in detail in Part I.

The Petitioner simply recognized that certain problems might exist—as they do in every company—and attempted to revive a mechanism for resolving those problems and opening lines of communication between management and the rank and file. This was not a new idea dreamed up, as the Board infers, to dilute union interest, which to Petitioner's knowledge was minimal. On the contrary, it is undisputed that a similar type committee had functioned in the past and that Petitioner continually had a Safety Committee which met regularly to discuss problems of safe working conditions and the like [R. T. 819, lines 7-11]. The grievance committee continued to meet periodically during the subsequent union organizational drive and discuss fringe benefit items and working conditions. The company gave consideration to each subject but was explicit in advising employees that it could not, and would not, make

any promises during the pendency of labor board proceedings [C. T. 26, lines 24-57].

Again here the Board's finding of violation rests entirely on the closeness in time between the activation of the committee and the *subsequent* union election drive. Following this rationale an employer must, after learning of *some* union activity, wait indefinitely to institute any such action for fear that it will be rendered unlawful if the union *later* obtains a sufficient showing of interest (30% under Board rule) to petition for an election, *a circumstance wholly outside the employer's control*. Such a theory, without more, does not sustain a Section 8(a)(2) finding. Certainly, at any rate, if a violation should be found, it is more technical than coercive and borders closely on *de minimis*.

C. Alleged Unlawful Discharges—Section 8(a)(3).

The Board agreed with and attempted to bolster its Trial Examiner's conclusion that Petitioner's discharge of two employees, Alfred Cantrell and Irving Klein, was discriminatorily motivated [R. T. 67-68; 33-37].

Before discussion of these terminations, a preliminary observation should be made. Even if this Court upholds the Board's findings of Section 8(a)(3) violations, such decision will have no effect on Petitioner's contention that it entertained a good faith doubt of the Union's majority status. This is because good faith doubt, or lack of it, is pertinent only to a Section 8(a)(5) refusal to bargain charge and is determined as of the date of a union's demand for recognition, a proposition the Trial Examiner implicitly confirms by basing his finding of lack of doubt solely on the alleged 8(a)(1) and (2) violations covered above²⁸ [C. T. 30].

²⁸Note, too, Klein's termination occurred June 25, exactly two weeks *after the election* [C. T. 34, lines 39-40].

In the case of both Cantrell and Klein, Petitioner supplied overwhelming evidence of economic justification for their discharge. Cantrell performed as a night milling machine and drill press operator during all the period of his employment. His supervisors, Walter Payton and Howland, both testified without contradiction that the "mix" of the work performed by Petitioner was progressively changing to aerospace and away from tool and die, resulting in considerably less need for tool makers in comparison to earlier years [R. T. 1025-1026; 1646-1651; 1107].

A consequent reduction in milling machine work led directly to Cantrell's layoff. At the time Cantrell was the only milling machine operator on the night shift and his hours had just been reduced [R. T. 1098-1100]. Since Cantrell's layoff, no one has ever been hired to replace him and whatever little milling machine work needs to be done is performed on the day shift [R. T. 1697; 1108].

Cantrell had not only never performed any work on the jig bore machine, a position open on the date of his termination [R. T. 1044], but had twice turned down a job as jig bore trainee [R. T. 1101-1102, 1640-1641; 1693]. One such refusal was accompanied by his emphatic undenied statement,

"No, I do not want to go with the jig bore room. I am not a jig bore man, and I do not want to become one." [R. T. 1693] (Emphasis supplied).

The Board stressed that Cantrell was a known union adherent as a basis for its conclusion [C. T. 67]. But the same can be said for a number of other employees who had loudly vocalized their pro-union feelings, and were *not* terminated.

It further questioned as “unreasonable” that an employee who had been working a 54-hour week, including 10 and 8 hours in his last two days would “abruptly become unneeded.” [C. T. 68]. This contention loses all force when it is seen that the company also laid off another employee, Victor J. Stone, for the same reason—lack of work, when Stone, like Cantrell, had worked 10 and 8 hours on the two days prior to his layoff [R. T. 1100-1101; R. Empl. Ex. 13].

Finally, the Board expressed surprise that Cantrell was not reoffered a position as a jig bore machinist since Petitioner was in need of one as evidenced by contemporaneous newspaper advertisements [C. T. 68]. Reliance on this rationale could not be more misplaced. True, at the time Cantrell was laid off there was an opening for an *experienced* jig bore operator. The Petitioner did, in fact, hire an experienced man in May of 1965 [R. T. 1105-1106]. But no one in management suspected that Cantrell had any experience on jig bores. Cantrell never relayed such information to Howland, either when Howland offered him the job of trainee, or on his termination. Nor did there appear on Cantrell’s application for employment anything to indicate such experience [R. T. 1044-1045; R. Empl. Ex. 11].

Finally, giving weight to Petitioner’s “failure to at least inquire of Cantrell if he would fill the jig bore vacancy at the time of his discharge” [C. T. 68], not only ignores the undenied fact that Cantrell could not have performed that job without two years’ prior training [R. T. 1042; 1355; 1371] but, moreover, indulges in the most strained of inferences. In the realm of speculation, it is just as probable, if not more so, that Petitioner’s failure to offer him the posi-

tion, assuming now that Cantrell was qualified to take it, was because he had already refused a similar job offer of trainee twice before in emphatic terms.

The findings regarding Irving Klein, a toolmaker, are based on equally rank speculation. Klein was terminated on June 25, 1965, two weeks *after* the election, which Petitioner had *won* 59-40. That the election had been concluded and in Petitioner's favor would seem to remove most reason for a discharge on account of Union activity. The Trial Examiner found no difficulty in conjuring up such a "reason,"

"Objections to the election were filed on June 17. The [Petitioner] had counsel and must quickly have learned that if the objections were sustained another election might be held. . . . The Petitioner] had reason to believe that if the election were to be set aside Klein would again be among those urging the employees to vote for the Union." [R. T. 37, lines 20-28].

This theory compounds numerous separate assumptions having no record support: that counsel had advised Petitioner concerning objection procedure prior to June 25; that Petitioner felt there was a strong chance the objections would be sustained; that when this occurred, a new election would be ordered; and that Klein would not have quit and would be a Union advocate in a second election that may have taken place *years* later.

And this conclusion was adopted despite substantial, uncontroverted evidence that Klein's discharge was because of his failure to perform his work on time which resulted in a consistent loss on projects assigned to him. In what can only be viewed as a substitution of

his own "business judgment" for that of the businessman's, the Trial Examiner declared:

"I am quite unconvinced that the [Petitioner] used the profit and loss calculations to appraise the competency or performance of the toolmakers." [C. T. 37, lines 1-2].

and concluded that Klein was discharged to discourage Union activity [C. T. 37, lines 34-36]. An impartial judgment of all the evidence shows that the only reasonable, logical conclusion is that Klein was justifiably terminated exactly for the reason given, namely, that of consistently failing to efficiently perform his work.

Assuming knowledge on Petitioner's part of Klein's union activity,²⁹ the discharge was nevertheless in keeping with company policy of terminating toolmakers who show a constant loss [R. T. 1339, lines 10-25]. Profit or loss on toolmaking jobs is determined based upon a job estimate [R. T. 1263] and depends on the toolmaker's ability to properly plan for the production of each job assigned. Thus, planning is his basic responsibility [R. T. 1041-1042; 188, lines 19-25; 119]; 1304-1305]. As a means of evaluating the

²⁹There is no showing that Petitioner was ever aware of any activities by Klein in support of the Union. The Board points to conversation between Klein and Howland in which the latter had stated that all employees campaigning in the company for the Union were, in his opinion, organizers. He had preceded this with the statement to Klein, "Irving, you don't look like a paid organizer to me." [C. T. 67, n. 1].

It is impossible to discern from this colloquy whether Howland was jesting, whether he was or was not accusing Klein of Union partisanship, or whether he really thought Klein was pro-union. Contrast this with Klein's own testimony that he was never questioned concerning his Union activities and that no supervisors was ever present when he engaged in such activities [R. T. 309, lines 7-25; 312, lines 14-25]. Petitioner's lack of knowledge of Union activity on the part of Klein requires a reversal of the Board on that point alone.

performance of the toolmakers, Howland keeps a profit and loss statement for each man. One was kept for Irving Klein [R. T. 1191-1196; R. Empl. Ex. 16]. It shows, that by December of 1964 the majority of his jobs were losses. Although some improvement occurred in March and Klein shared in the March 8 wage increase [R. T. 1265], between March and mid-June 1965, Klein's record of profit and loss showed a marked deterioration. As the Trial Examiner concedes, "Klein's profit and loss statement thereafter shows an almost unbroken string of losses ranging from \$179 to \$839." [C. T. 36, lines 54-55; R. Empl. Ex. 18].

Howland evaluated Klein's performance and in considering a termination said this:

"I took his entire picture into consideration, figuring his volume, his potential, how he could get the job out under our system and from all of his data, I decided he couldn't function in our system." [R. T. 1266, lines 3-6].

Accordingly, Howland terminated Klein because, as his discharge notice [R. Empl. Ex. 17] stated, Klein "failed to perform work in the time allowed."

The overwhelming evidence is that such calculations were and are used for the purposes stated by Petitioner. When applied to Klein, the same as all other toolmakers, they resulted in his discharge. The Trial Examiner remained "unconvinced" principally because he did not believe the profit and loss statements fairly measured performance [C. T. 36, lines 13-43]. It is not his duty to pass judgment on the business wisdom of Petitioner, but rather to decide whether the statements were utilized as indicated. The uncontradicted evidence is that they were. The mandate of *NLRB v. Universal Camera Corp.*, 340 U.S. 474 (1951), that the

Board's finding be supported by substantial *evidence*, has been contravened.

The burden of proof was on the General Counsel to prove that some part of the company's motivation was discriminatory. *NLRB v. Swan Super Cleaners, Inc.*, 384 F. 2d 609 (6th Cir., 1967). This he failed to do. It is not enough merely to show that the Petitioner knew Cantrell and Klein were Union activists, assuming even that has been demonstrated, for such knowledge does not insulate them from discharge for a nondiscriminatory, good cause. *Lawson Milk Co. v. NLRB*, 317 F. 2d 756, 760 (6th Cir., 1963); *Crawford Mfg. Co. v. NLRB*, 386 F. 2d 367 (4th Cir., 1967). Discriminatory motive cannot reside entirely, as here, in a Board view that the discharges, in its opinion and absent any objective evidence to support it, were without sufficient cause. *NLRB v. Houston Chronicle Pub. Co.*, 211 F. 2d 848, 854 (5th Cir., 1954); *NLRB v. Wagner Iron Works*, 220 F. 2d 126, 133 (7th Cir., 1955) *NLRB v. Swan Super Cleaners, Inc., supra*. For these reasons, the Board's unfair labor practice findings under Section 8(a)(3) lack the necessary substantial evidentiary support and enforcement thereof should be denied.

Conclusion.

For each of the foregoing reasons the Decision and Order of the Respondent should be set aside in each and every particular.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.



TOOL & DIE SHOPS
OF SOUTHERN CALIFORNIA

In the statements below, please select one of the three answers which you believe is correct.

1. In order for the U. A. W. to petition the United States Government to conduct a secret ballot representation election at your Company, the law requires the U. A. W. to submit Authorization cards from at least---

- A. 30% of the plant employees
- B. 50% of the plant employees
- C. 60% of the plant employees



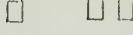
2. The most effective way to obtain signed U. A. W. Authorization Cards from employees in my plant is ---

- A. To attach an Authorization Card to every handbill that is distributed.
- B. To organize an effective in-plant Volunteer Organizing Committee within the plant, with several V.O.'s in each dept.
- C. To mail Authorization Cards to the homes of employees.



3. When a tool and die worker signs a U. A. W. Authorization Card, it means that---

- A. He will definitely vote "YES" for the U. A. W. on Election Day.
- B. If the employee knows very little about the U. A. W., its contracts and achievements, he may still be swayed by last minute Company letters and captive audience meetings, to vote for the Company.
- C. He is just trying to get the Volunteer Organizer off his back.



4. Statistics prove, that where a Union petitions the United States Government to conduct an election at a plant, the majority of plants voted for the Union when the plant had between---

- A. 30% to 40% of the employees signed up on Authorization Cards.
- B. 50% to 60% of the employees signed up on Authorization Cards.
- C. 70% to 100% of the employees signed up on Authorization Cards.



5. All tool and die workers should be encouraged to attend U. A. W. Organization meetings because---

- A. It gives an employee a chance to get a night "out with the boys."
- B. It affords an employee an opportunity to listen to both sides before forming an opinion for or against the U. A. W.
- C. It provides an opportunity for tool and die workers to learn the ways of self-organization, so their wages can be improved, their fringe benefits broadened and their standard of living



In the questions listed below, select the answer which your group believes is correct:

1. AFTER WE HAVE PETITIONED THE U. S. GOVERNMENT FOR A SECRET BALLOT REPRESENTATION ELECTION AT OUR PLANT

- (a) The Volunteer Organizing Committee can sit back and relax knowing that the election is in the bag. ☐
- (b) We can discontinue holding our plant-wide and V. O. meetings. ☐
- (c) We must intensify our V. O. and plant-wide meetings and we must strive to have as great an attendance as possible. ☐

2. AFTER WE HAVE PETITIONED THE U. S. GOVERNMENT FOR A SECRET BALLOT REPRESENTATION ELECTION AT OUR PLANT

- (a) We can reasonably expect our Company to sit idly by and not do a thing to influence our vote on election day. ☐
- (b) We can reasonably expect that the outside labor consultant will encourage a "yes" vote for the union on election day. ☐
- (c) We can reasonably expect the outside labor consultant and top management officials to begin an intensified campaign using captive audience meetings, pre-packaged letters to our homes and other forms of paternalistic solicitation on their part. ☐

3. A NUMBER OF WEEKS WILL PASS BETWEEN THE TIME WE PETITION FOR OUR ELECTION AND THE TIME WE HAVE OUR ELECTION. THIS IS DUE TO GOVERNMENT PROCEDURES AND OFTEN TIMES DUE TO THE FACT THAT A COMPANY WILL REFUSE TO CONSENT TO AN ELECTION. DURING THIS PERIOD OF TIME, WE SHOULD

- (a) Continue to solicit the support of non-card signers in our plant by explaining the union program to them and by informing them of anticipated company activities whereby the company will try to divide the employees. ☐
- (b) Ignore and bypass the non-card signers because we are confident that we can win the election without their support. ☐
- (c) Involve ourselves in arguments and name calling with those employees who are strongly pro-company. ☐

4. DURING THIS PERIOD OF TIME, WHILE WE ARE AWAITING OUR ELECTION DATE, WE WOULD PLAN TO SOLIDIFY OUR UNION GROUP BY

- (a) Planning now to encourage as many people as possible to attend our Union meetings. ☐
- (b) Establishing a well organized and methodical program for making house-calls on specific people at their homes. ☐
- (c) Constantly striving to improve our communication system in the plant, so that everyone will be aware of all of the issues in our campaign. ☐

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APPENDIX B.

Transcript References Depicting General Employer-Employee Communication Practices as They Pertain to the Good Faith Question.

Addison [R. T. 856-857; 1339-1340; 1489-1490; 1546-1548]; Ahlstrom [R. T. 1164]; Amphor [R. T. 651-664; 784-785; 1237]; Berno [R. T. 1757; 1760-1772]; Bertram [R. T. 1619]; Booze [R. T. 1335; 1430-1431; 1556-1557]; Bradley [R. T. 1163; 1496-1498; 1620-1621]; Burke [R. T. 1658-1659]; Burns [R. T. 1524-1525. 1593]; Cantrell [R. T. 911-912]; Cheetham [R. T. 777; 1410-1411; 1416; 1594-1595]; Christenson [R. T. 1459; 1664]; Christopher [R. T. 1689-1690]; Cisneros [R. T. 586; 1668-1669; 1705-1706]; Clendenin [R. T. 856-861; 1528-1529; 1540-1541; 1669-1671]; Congrove [R. T. 1671]; A. Crandall [R. T. 1672-1673]; D. Crandall [R. T. 1162]; Cuda [R. T. 861-862]; Dale [R. T. 1512-1516]; Dellomes [R. T. 1361-1362; 1368-1370]; Dodd [R. T. 1674]; Doebler [R. T. 1567-1568]; Estrada [R. T. 1381; 1675-1676]; Fehland [R. T. 1395-1399; 1529-1530; 1568-1569]; Freeze [R. T. 1676-1678; 1706]; Gardner [R. T. 1598-1599]; Garger [R. T. 1519]; Garrett [R. T. 1333]; Gowen [R. T. 1171; 1337]; Grive [R. T. 861-865; 1622]; Hibbard [R. T. 1172]; Hirschmann [R. T. 1569-1570]; Hoef [R. T. 1570-1571]; Hunt [R. T. 1477; 1680]; Johnson [R. T. 1608]; Kastendick [R. T. 1238; 155; 1571; 1608]; Kevelighan [R. T. 1320-1321; 1705-1706]; Kimura [R. T. 1439-1440; 1571-1572]; I. Klein [R. T. 1608]; Knoles [R. T. 411-414; 778; 867-868; 1331]; Kocsis [R. T. 1163; 1574-1575]; Kofink [R. T. 507-511; 780; 1575]; Kruse [R. T. 1171]; Kuhmann [R. T. 786; 1683]; Lamb [R. T. 1608; 1622-

1623]; Lary [R. T. 788; 1171]; Lawrence [R. T. 1163-1164; 1324-1325; 1482; 1600; 1613-1614]; Letts [R. T. 1530-1531; 1542]; Mancini [R. T. 1486-1487; 1683-1684]; Mansfield [R. T. 623; 1685]; Mellone [R. T. 1331]; Meier [R. T. 751]; Moran [R. T. 1167; 1326]; Morris [R. T. 879-880; 1578]; Myer [R. T. 1686-1687]; Nowak [R. T. 1556-1557]; Pashone [R. T. 1509-1510; 1622-1626]; Poirier [R. T. 1532-1533]; Polony [R. T. 779; 1375-1377; 1601]; Proudfoot [R. T. 480-489; 1332; 1534-1535]; Rawl [R. T. 1687-1688]; Rhedin [R. T. 1451; 1454; 1552-1553]; Riegler [R. T. 1389-1390; 1393-1395; 1562-1564]; Scovel [R. T. 1494; 1688-1689]; Schlapp [R. T. 1579-1580]; Senyk [R. T. 1402-1403; 1580-1581]; Seymour [R. T. 1443; 1772-1773]; Smith [R. T. 1324; 1602-1603]; Stowe [R. T. 925]; Teiman [R. T. 1333]; Thomas [R. T. 1337]; Voegeli [R. T. 1321-1322; 1553-1554; 1605-1606]; Vogl [R. T. 557-558; 781; 1335]; Welsh [R. T. 1332]; Rbt. Weymar [R. T. 522]; Rolf Weymar [R. T. 1332-1333]; Whiteman [R. T. 1322-1323; 1435-1436]; Williams [R. T. 1554-1555]; Wilson [R. T. 1322; 1555]; Wright [R. T. 874; 1239]; Zadnik [R. T. 1166].

APPENDIX C.

Evidence Which Employer Considered in Formulating Its Decisions on Each and Every Employee's Union Sentiment—The Major Basis for Petitioner's Good Faith Doubt.

1. Addison:

Plant Manager Howland put Addison down as being against the Union on Respondent's Exhibit #7. Fink and Howland both testified that on the evening of March 15th, Howland had stated to Fink he had had a conversation with Addison who indicated to him that he was against the Union, that Addison had mentioned something about a friend who had owned a shop which had a union and based upon what Addison had heard from his friend, he did not believe Respondent* should have a union. Howland further testified that Lawler, a supervisor, had told Howland that he, Lawler, had a conversation with Addison wherein Addison had clearly expressed himself as being against the Union [R. T. 856, line 22, to R. T. 857, line 4; R. T. 1329, line 25, to R. T. 1330, line 3].

Addison himself testified that he had refused to sign an authorization card and that at the end of February or early March of 1965, in a conversation he had had with Lawler, he told the latter he wasn't in favor of the Union in the shop; in fact, testified Addison, he made his position known to everybody from the beginning of the Union activity [R. T. 1489, line 18, to R. T. 1491, line 19]. Lawler testified that he had had a conversation with Addison at the end of February, as well as a number of conversations prior to that time, con-

*References to "Respondent" in this Appendix are to the employer.

cerning the Union and that Addison told Lawler he was upset about the Union activity, discussed his friend's difficulty with the Union, and said he did not want to see the Union in Respondent's plant. That same evening, at the end of February, Lawler told Howland what Addison had said to him about the Union [R. T. 1546, line 20, to R. T. 1548, line 9].

2. *Ahlstrom:*

Howland put this employee down on Respondent's Exhibit #7 as being for the Union. Fink confirmed it by a notation. On the evening of March 15th, Howland had told Fink that Ahlstrom had indicated to Howland that Ahlstrom was strongly for the Union [R. T. 1164, lines 16-19].

3. *Amthor:*

This employee's name was not on Respondent's Exhibit #7 because he was not a skilled worker. However, both Howland and Fink felt that he would be able to vote because he was a carpenter and did crating in the plant [R. T. 784, line 25, to R. T. 785, line 7]. Howland told Fink at the meeting of March 15th that Amthor had told Howland he was against the Union; Howland also testified that in early March, Amthor had told him that Ahlstrom was continually coming out to the carpenter's shop asking Amthor to sign a card and that Amthor finally signed the card in order to get Ahlstrom off his back [R. T. 784, line 25, to R. T. 785, line 7; R. T. 1237, lines 14-25].

Amthor, himself, fully supported Howland's and Fink's testimony that he was against the Union; he stated that he had a conversation a few days after he signed the authorization card in which he voluntarily

told Howland he did not want any part of the Union [R. T. 651, line 14, to R. T. 654, line 1].

4. *Anothaiwongs:*

This employee, who at the time of the hearing was in Thailand [R. T. 1739, lines 14-18], told Howland that because he was leaving the country he did not know if the Union could do him any good. Based upon Anothaiwongs' own statements of indecision regarding the Union to Howland, Howland, on Respondent's Exhibit #7, marked Anothaiwongs as being undecided [R. T. 1331, line 23, to R. T. 1332, line 2]. It would appear that Anothaiwongs' lack of sympathy for the Union cause was also confirmed to Howland by a conversation that Isak had with Anothaiwongs which Isak related to Howland. In the latter part of February, Isak advised Anothaiwongs not to go all over the plant during working hours but to stick to his work. Anothaiwongs replied, "Most of the guys do bother me to sign the card and want to influence me for the Union. I really don't care for them. I just want to keep them off my back because they are sometimes very nasty." [R. T. 1564, line 15, to R. T. 1565, line 17]. Thus, with the evidence that Howland had at the time of his preparing Respondent's Exhibit #7, at the very least it would reasonably appear to him that Anothaiwongs was "at best" against the Union, and "at worst," undecided.

5. *Berno:*

While Berno (as other employees who are referred to as indirect personnel, though stipulated to as being part of the unit) was not listed on Respondent's Exhibit #7, and though what Fink and Howland dis-

cussed about Berno on the evening of March 15th was not recalled [R. T. 901, lines 23-25; R. T. 1170, line 20], Berno's attitude toward the Union, as expressed to Fink and Howland prior to this time, made it quite clear to both of them that Berno was undoubtedly against the Union.

6. *Bertram:*

Howland put Bertram down as being for the Union, and this was based upon both the fact that he had to reprimand Grice, who was against the Union, for his physically threatening Bertram and also because Zeman, another supervisor, had reported to Howland that Bertram indicated he was probably for the Union. [R. T. 1334, lines 16-19; R. T. 1619, line 11, to R. T. 1620, line 15].

7. *Boone:*

Boone, another indirect employee who was not listed on Respondent's Exhibit #7, was also discussed between Fink and Howland that evening. He was put down as "undecided" though the reason is not given. [R. T. 785, lines 18-20; R. T. 1171, line 21]. In point of fact, he did not sign an authorization card.

8. *Booze:*

Howland put down on Respondent's Exhibit #7 that Booze was against the Union. This was based upon the fact that Booze, at his bench, had previously told Howland that he didn't see where the Union could do him any good, that the Union hadn't done him any good in the past. Further, Isak testified that in the early part of March he told Howland in his office that Booze was against the Union. Isak based this in-

formation upon the fact that Fred Nowak, who works close to Booze, had told Isak that Booze, himself, had said he had no use for the Union. [R. T. 1335, lines 16-20; R. T. 1565, line 18, to R. T. 1566, line 22; R. T. 1567, lines 5-19].

Booze, himself, testified that he had told Howland around the first of March he had attended a Union meeting but did not think the Union could do him any good [R. T. 1330, line 8, to R. T. 1331, line 2]. Based upon this evidence, Howland had no doubt that Booze was against the Union.

9. *Bradley:*

Bradley was listed by Howland on Respondent's Exhibit #7 as undecided. The evidence shows that Howland himself never had any direct conversations with Bradley that were concrete enough so as to leave no doubt in Howland's mind that Bradley was against the Union. These conversations, however, did indicate to Howland that Bradley was uncertain. [R. T. 1163, lines 9-14]. Zeman, however, testified that Bradley told him in the latter part of February at his bench that he had received a phone call about a Union meeting and inquired of Zeman what was going on. Zeman told him about the Union organizational efforts, and Bradley stated he was against the Union. Later that day, Bradley stated to Zeman that not only was he against the Union, but that another employee, Scoggins, was also against the Union. At the end of February, Zeman related these conversations he had had with Bradley to Howland [R. T. 1620, line 16, to R. T. 1621, line 18].

Bradley, himself, testified and fully supported Zeman's testimony; he related that he inquired of

Zeman about the Union activity and told Zeman at that time he was against the Union and later the same day told him that Scoggins was also against the Union, and that he did this voluntarily [R. T. 1497, line 3, to R. T. 1498, line 9]. It is quite clear, therefore, that Bradley made his anti-union views known to Respondent's officials and that Howland's listing him as being undecided was, if anything, an expression of extreme caution on the part of Howland.

10. *Burke:*

Howland listed Burke on Respondent's Exhibit #7 as being for the Union. He told Fink on the evening of March 15 that Burke himself had told him that he was for the Union. Burke also told Payton the same thing at the end of February, and Payton had related this conversation to Howland [R. T. 1162, line 23, to R. T. 1163, line 2; R. T. 1662, line 21, to R. T. 1663, line 9].

11. *Burns:*

This employee was listed on Respondent's Exhibit #7 as being against the Union and on March 15 Howland told Fink that Burns himself had expressed to Howland several times his opinions against the Union and that Burns was a staunch conservative [R. T. 1166, lines 4-7]. The evidence also shows that Burns advised Woods, his supervisor, of Union activity around February 22nd and that in a later conversation, Burns stated emphatically that he was against the Union. Woods, in turn, told Howland of his conversations with Burns [R. T. 1524, line 20, to R. T. 1525, line 19; R. T. 1527, line 4, to R. T. 1528, line 6; R. T. 1539, lines 2-6].

Negrete, another supervisor, also testified that Burns told him in the early part of March that he, Burns, wanted no part of the Union and he didn't believe in Unions [R. T. 1593, lines 9-23]. At the time of the hearing Burns was in Ohio [R. T. 1739, lines 20-21].

12. *Cantrell*:

This machinist employee was put down by Howland on Respondent's Exhibit #7 as being for the Union. Fink entered an additional asterisk before his name on that document because he had just had a conversation a couple of days before and Cantrell indicated he had been a Union member [R. T. 783, lines 15-20]. While in his conversation with Cantrell on March 12, Cantrell told Fink that he did not think Mechanical Specialties needed a Union, based upon his statement that he was a Union member, Fink agreed with Howland. Howland had informed Fink that Payton had said that Cantrell was for the Union [R. T. 911, line 22, to R. T. 913, line 20; R. T. 1168, lines 19-20]. Payton testified that he told Howland of Cantrell's statements that he, Cantrell, was in favor of the Union [R. T. 1668, lines 11-16].

13. *Chavez*:

Chavez was one of the indirect personnel who was not listed on Respondent's Exhibit #7 but was discussed on the evening of March 15 [R. T. 1170, line 22]. Based upon the conversations that both Fink and Howland had with Chavez and Chavez' assertions of ultra-conservative views, both Fink and Howland considered him to be against the Union [R. T. 787, lines 17-19].

14. *Cheetham:*

Howland listed Cheetham as being against the Union on Respondent's Exhibit #7. Howland testified that Negrete, Cheetham's supervisor, had told him, Howland, of conversations with Cheetham regarding the Union and both Fink and Howland recalled that Cheetham had had experiences in England and Canada with the Unions and that Cheetham indicated he did not want a Union in Respondent's plant [R. T. 857, lines 9-17; R. T. 1330, lines 8-17]. Previously, Cheetham had asked Fink if it was all right if he could attend the Union meeting and Fink had told him that it would be wise for Cheetham to see what the Union had to offer. In that conversation, Cheetham had indicated to Fink that he was undecided, which caused Fink to put the question mark notation beside Cheetham's name [R. T. 777, lines 3-9].

Cheetham himself fully supported both Fink and Howland's testimony and testified that some time at the end of February or the beginning of March he had had conversations with Negrete in which he indicated he felt the conditions at Respondent's plant were very favorable and that he did not think the Union could improve conditions [R. T. 1410-1417]. Negrete, for his part, testified that Cheetham had called him over to his machine one day and asked questions about the Union. The following day, Cheetham told Negrete he had been to a meeting and was against the Union because it offered him nothing. Negrete told Howland about his conversation with Cheetham around the first of March [R. T. 1594, line 10, to R. T. 1595, line 20; R. T. 1607, lines 8-14].

15. *Christenson:*

At the hearing, this former employee testified that at the time the authorization cards were being distributed in February and the beginning of March, he told Payton that he was against the Union, and also told him that Cantrell threatened to sign a card for Christenson [R. T. 1459, lines 10-20]. Payton testified that in the latter part of February, Christenson told him he was against the Union; that he had belonged to a Union in another plant and did not feel he had gotten a fair deal and did not want a Union in this plant [R. T. 1663, line 10, to R. T. 1664, line 1]. Payton further testified that he had told Howland about his conversations with Christenson. Subsequently, in March, according to the testimony of Payton, Christenson told him that he had signed a card to bring about an election but was against the Union. Payton related this conversation to Howland the following day [R. T. 1665, line 2, to R. T. 1666, line 1].

Though Howland listed Christenson as being undecided on Respondent's Exhibit #7, and based this, according to his testimony, on Payton telling him that Christenson was undecided [R. T. 1169, lines 17-18], since both Christenson and Payton testified that Christenson had stated he was against the Union, it would appear that Howland listed Christenson as undecided as a result of confusion in Howland's mind, because, in fact, Christenson was clearly and continually against the Union.

16. *Cisneros:*

This employee was listed on Respondent's Exhibit #7 as undecided. He testified that he told Payton, his supervisor, that he was undecided. Payton stated that

the first or second day of March 1965, he had a conversation with Cisneros who had asked him many questions, and had indicated to Payton he was undecided. Payton, at the end of the conversation advised him to speak to a fellow employee, Kebelighan, for further guidance regarding Union organization [R. T. 586, lines 18-22; R. T. 1668, line 20, to R. T. 1669, line 24; R. T. 1705, line 12, to R. T. 1706, line 9]. Payton related his conversation with Cisneros to Howland the following day. [R. T. 1335, lines 7-11; R. T. 1669, lines 20-24]. It is clear that Cisneros had prior to March 15 made known to management officials that he was undecided regarding the Union.

17. *Clendenin:*

Fink testified that he concurred with Howland, as indicated on Respondent's Exhibit #7, that Clendenin was against the Union. Fink had spoken to Clendenin several times regarding the Union, beginning around the first of March, in the Inspection Department. Clendenin had told Fink that he did not want the Union [R. T. 777, line 19, to Tr. 778, line 4; R. T. 859, line 14, to R. T. 861, line 8].

Woods testified that he had a conversation with Clendenin at the end of February; that he usually spoke to Clendenin every evening, and that Clendenin had mentioned the subject of Union activities and told Woods that he was against a union in the plant. The following day, Woods related this conversation to Howland [R. T. 1528, line 10, to R. T. 1529, line 7; R. T. 1539, line 16, to R. T. 1541, line 3].

Payton testified that at the end of February, Clendenin came to him and stated that if the Union got

in, he, Clendenin, would probably quit; he told Payton quite clearly that he did not want a Union at Mechanical Specialties. Payton related this conversation to Howland the following day [R. T. 1669, line 25, to R. T. 1671, line 2].

18. *Congrove:*

This employee was listed on Respondent's Exhibit #7 as being for the Union. Howland related to Fink the fact that Payton had told Howland that Congrove was for the Union and Payton in his testimony supported this conclusion [R. T. 1167; R. T. 1671, lines 10-22].

19. *Connor:*

In Respondent's Exhibit #7, Connor is listed as being for the Union. Negrete had had a conversation with Connor regarding the Union wherein Connor had stated he was not in favor of the Union though he had been a Union man back East. Connor, according to the testimony of Negrete, stated at the time that if he had anything to say to management, he would go right to the top. Negrete told this to Howland [R. T. 1596, line 16, to R. T. 1597, line 3; R. T. 1607, lines 15-20]. Howland, however, testified that he had had a talk with Connor at his machine and Connor had indicated that he was unhappy with the way things were going on in the plant. Because of Connor's statements to Howland, Howland disregarded the information supplied to him by Negrete and put Connor down as being for the Union [R. T. 1318, line 18, to R. T. 1319, line 5].

20. *A. Crandall:*

A. Crandall was listed by Howland on Respondent's Exhibit #7 as being undecided. Howland stated that Zeman had indicated that Crandall was for the Union but that Payton indicated and had given reasons to Howland that Crandall was undecided.

Payton testified that at the beginning of March, in the production area, Crandall had asked Payton's opinion was had, the great weight of evidence indicates he was against the Union, Crandall said "I haven't made up my mind as to which way I will vote yet." Payton told Howland of this conversation the following day [R. T. 1672, line 8, to R. T. 1673, line 5].

As a rebuttal witness, the General Counsel put Crandall on the stand and he testified that he did have a conversation with Payton and that he did tell Payton he was undecided. Crandall, however, testified that he "guessed" that his talk with Payton was about six weeks after the latter part of February or, in other words, some time around the middle of April [R. T. 1798, line 8, to R. T. 1802, line 16].

In that Payton was quite clear that that conversation with Crandall was at the beginning of March and Crandall was in doubt as to when the conversation took place, and in that Howland had stated that Payton had told him of the conversation prior to March 15, and in that Payton was on sick leave during most of April during the time that Crandall "guessed" the conversation was had, the great weight of evidence indicates that at the beginning of March Crandall told Payton that he was undecided.

21. *D. Crandall:*

D. Crandall, the son of A. Crandall, was listed on Respondent's Exhibit #7 as being for the Union. This employee had told Howland that he thought a Union would better his trade and this is what Howland told Fink at the meeting on March 15th [R. T. 1162, lines 14-20]. Lawler, his supervisor, had expressed the same opinion to Howland at the end of February [R. T. 1548, line 10, to R. T. 1549, line 13].

22. *Cuda:*

Howland listed Cuda as being undecided on Respondent's Exhibit #7. At the meeting of March 15, Fink testified that Howland said that Cuda had said his father's business had had union difficulties. Cuda testified but neither confirmed nor denied having raised this subject to management officials or others [R. T. 861, line 17, to R. T. 862, line 8].

23. *Dale:*

Howland listed this employee on Respondent's Exhibit #7 as being against the Union. Howland stated to Fink on March 15 that Negrete, Dale's leadman, had said that Dale had told him that he, Dale, did not require a third party but could take care of his problems himself [R. T. 1165, line 23, to R. T. 1166, line 1]. Dale testified that he had told Howland he was not for the Union some time around the first of March and that within a couple of weeks of that time he had a talk with Negrete and also told Negrete he was against the Union [R. T. 1513; R. T. 1516]. Negrete, for his part, stated that at the end of February or the beginning of March while riding to work with Dale,

Dale had stated in conversations that he was against the Union and that he could take care of himself. Negrete at that time told Howland of his conversations with Dale [R. T. 1597, line 6, to R. T. 1598, line 5].

24. *Dellomes:*

Dellomes was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting that Payton had told him that Dellomes stated he was against the Union [R. T. 1164, line 24, to R. T. 1165, line 4]. Dellomes, himself, testified that Payton was present at the lunch period break where all employees were gathered when Dellomes had told Cantrell and others he was definitely against the Union and that he had signed a card solely to get an election and get the election over with and that he would quit his job rather than become a member of the Union [R. T. 1357, line 12, to R. T. 1359, line 19]. Dellomes further testified that, at the end of February or the beginning of March, he had several conversations with Payton in which he told him quite clearly he was against the Union [R. T. 1361, line 11, to R. T. 1362, line 8; R. T. 1368, line 19, to R. T. 1370, line 12]. Payton fully corroborated the testimony of Dellomes regarding the conversations and also testified that he told Howland about these conversations the day following each of them [R. T. 1666, line 2, to R. T. 1667, line 23; R. T. 1673, lines 17-25].

25. *Dodd:*

Respondent's Exhibit #7 lists Dodd as being for the Union. Howland testified that Payton had told him that Dodd was definitely for the Union and Payton

testified that Dodd told him at the end of February, "I have belonged to many unions, and I have never belonged to one yet but what I didn't get a screwing but I am going to vote for the Union again." [R. T. 1333, lines 18-19; R. T. 1674, lines 1-16].

26. *D. Doebler:*

Howland listed Dennis Doebler on Respondent's Exhibit #7 as being undecided. He based this on the fact, and so told Fink, that Doebler, an apprentice, had stated that he, Doebler, would make up his own mind in regard to the Union [R. T. 1168, lines 15-18].

Isak testified that he had a talk with Doebler in the latter part of February at the bandsaw and that Doebler said because he was an apprentice, he did not see how the Union could do him any good. On the same day, Isak related this conversation with Doebler to Howland [R. T. 1567, line 20, to R. T. 1568, line 14]. Doebler, at the time of the hearing was in the Army [R. T. 1739; R. T. 1740].

27. *F. Doebler:*

F. Doebler, the father of Dennis, during the period of Union organization, was on sick leave and away from the plant. Naturally, both Fink and Howland presumed that under the circumstances, he had not signed a Union authorization card, or had indicated his Union beliefs. Thus, Howland's notation on Respondent's Exhibit #7 merely indicated that F. Doebler was "sick".

28. *Dominguez:*

There is no direct testimony regarding this employee. He was not listed on Respondent's Exhibit #7 nor did he sign a Union authorization card.

29. *Dufek:*

Respondent's Exhibit #7 lists Dufek as being "undecided." Howland said that he told Fink on March 15 that Payton had stated that he, Payton, did not know where Dufek stood on the Union question. Zadnik, however, had told Howland that he felt that Dufek was against the Union. Howland, therefore, put Dufek down as undecided [R. T. 1168, lines 5-9].

Payton testified that he had no conversations with Dufek and did not know whether he was for or against the Union, though he felt that Dufek might be for the Union, in that many of the Union adherents were constantly coming over to his machine [R. T. 1674, line 22, to R. T. 1675, line 6; R. T. 1713, line 23, to R. T. 1714, line 15].

30. *Estrada:*

Respondent's Exhibit #7 lists Estrada as being against the Union, with the further notation, "weak." Howland, on March 15, told Fink that Berno had told him that at the Union meeting the prior day Estrada had told Berno that he was there merely because of his inquisitiveness about the Union but that he was stronger against the Union than for it [R. T. 1164, lines 4-10].

Estrada, himself, testified that he told Berno the latter part of February or the beginning of March that he didn't think it was necessary to have a Union in Respondent's plant. Estrada also said that around the same time he had a similar conversation with Payton and told him the same thing [R. T. 1381, lines 10-19].

Payton testified that he had a conversation with Estrada at his working place the end of February and

Estrada stated that he was “against the union coming in and that he had either sent a card in or was going to send a card in” but was doing it solely for the purpose of getting information to find out what was going on. He also complained to Payton about the pressure being put upon him to send in a card. Payton related this conversation that very afternoon to Howland [R. T. 1675, line 7, to R. T. 1676, line 11].

Berno testified that following the meeting of March 14, he spoke to Estrada who told him that he really didn't care about the Union but wanted to find out what was going on [R. T. 1724, line 12-20]. On the morning of March 15, Berno told Howland about his conversation with Estrada [R. T. 1236, lines 17-19; R. T. 1728, lines 15-17; R. T. 1746, lines 18-19; R. T. 1570 lines 7-8].

31. *Fehland:*

Fehland was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting on March 15 that Fehland had expressed he was against the Union and did not want the Union in the plant [R. T. 1164, lines 13-15].

Fehland, himself, testified that in February and March he had talked with Woods, his supervisor, and had told Woods he was opposed to the Union coming into the Company [R. T. 1395; R. T. 1399].

Woods testified that his conversations with Fehland were in the latter part of February or the beginning of March and that he had related these to Howland a day or two afterwards [R. T. 1529, line 10, to R. T. 1530, line 20; R. T. 1541, line 9, to R. T. 1542, line 10].

Isak also said that his conversations were in the latter part of February, or early part of March, and that he had related these to Howland around that time [R. T. 1568, line 15, to R. T. 1569, line 14].

32. *Freeze:*

Howland, on Respondent's Exhibit #7, put Freeze down as being against the Union. Howland testified that Payton had told him Freeze was against the Union [R. T. 1334, line 21]. Payton testified that the latter part of February, Freeze called him over to his working area and told him he was behind the company and against the Union. Some time between March 10 and March 12, Freeze again spoke to Payton and told Payton that Cantrell had threatened to sign an authorization card for Freeze. Both of these conversations were related to Howland [R. T. 1676, line 12, to R. T. 1678, line 1].

33. *Ganske:*

This employee was not listed on Respondent's Exhibit #7, undoubtedly because he was listed among indirect personnel. He was, however, discussed at the meeting between Fink and Howland on March 15 [R. T. 1170, line 22]. What, exactly, was said is not known; it is not on the record. Ganske did not sign a card.

34. *Gardner:*

Gardner was listed on Respondent's Exhibit #7 as being against the Union. Howland told Fink at their meeting that Negrete had told Howland that Gardner was against the Union [R. T. 1168, line 22]. Negrete testified that the first part of March he had a conversation with Gardner at his machine; Gardner had

asked him about the Union and Negrete said he didn't know anything about it. Gardner then said, "If it gets in, I'll quit." Negrete related this conversation to Howland around that time [R. T. 1598, line 8, to R. T. 1599, line 8].

35. *Garger:*

Howland listed Garger on Respondent's Exhibit #7 as being undecided. Garger testified that he normally has conversations with Howland every day and that it was quite possible that the Union question was raised at some of these discussions [R. T. 1519, lines 7-14]. Howland testified that he himself did not have sufficient knowledge from his conversations with Garger to understand Garger's Union position [R. T. 1167, lines 6-8].

36. *Garrett:*

Respondent's Exhibit #7 lists Garrett as being against the Union. Howland testified that Garrett had spoken to him at his bench about the Union and based upon what Garrett said it appeared to Howland that he was not for the Union. Zeman subsequently told Howland that Garrett had said he was against the Union [R. T. 1333, lines 5-11].

37. *Gedminas:*

At the meeting of March 15, Howland told Fink that Gedminas was an individual who had difficulty in making up his mind and it would be hard to determine how he would vote and, therefore, he put him down as being for the Union on Respondent's Exhibit #7 [R. T. 862, lines 11-16].

Lawler supported this conclusion by relating that Gedminas would be for the Union one day and against the Union another day in conversations he had with him, and Lawler so advised Howland [R. T. 1549, line 14, to R. T. 1550, line 3].

38. *Gowan:*

This employee was another one of the indirect personnel who was not listed on Respondent's Exhibit #7 but was discussed at the meeting between Fink and Howland on March 15 [R. T. 1170, line 24, to R. T. 1171, line 9]. Howland testified that Gowan told him and Berno that he was not for the Union because the Union would hinder him in his work. Gowan said he had told the same thing to Berno who told it to both Fink and Howland [R. T. 786, lines 16-20; R. T. 1170, line 24, to R. T. 1171, line 9; R. T. 1337, lines 6-12].

Berno testified that in the early part of March Gowan told him that he didn't want to have anything to do with the Union and was afraid the Union would interfere with scheduling production and hinder him in his job. He did not want to attend the Union meeting. Berno testified he told this to Howland [R. T. 1736, line 15, to R. T. 1737, line 16; R. T. 1776, lines 6-21].

39. *Grice:*

Respondent's Exhibit #7 lists Grice as being against the Union. Fink testified that he had discussions with Grice wherein Grice had told him that a friend of Grice's was injured in a strike and he was against the Union [R. T. 778, lines 6-13]. Grice had made the same statements prior to March 15 to Howland

[R. T. 862, line 23, to R. T. 865, line 8; R. T. 1319, lines 7-19]. Zeman testified in late February Grice told him on numerous occasions he was positively against the Union and around that time Zeman related this information to Howland [R. T. 1621, line 19, to R. T. 1622, line 20].

40. *Gumm:*

Howland listed Gumm on Respondent's Exhibit #7 as being undecided. Fink testified that at the meeting on March 15 Howland had said that Gumm was always on the fence and felt he was undecided [R. T. 865, line 24, to R. T. 866, line 5]. Howland testified that in conversations he had with Gumm as well as conversations that Negrete had which he related to Howland, Gumm appeared undecided [R. T. 1330, lines 20-40]. Negrete supported this testimony by stating that he had conversations with Gumm in which he took differing positions for and against the Union. In March, Negrete told Howland he did not know which way Gumm would go, that he thought Gumm was against the Union but wasn't sure [R. T. 1599, line 9, to R. T. 1600, line 12].

41. *Haeler:*

Respondent's Exhibit #7 lists Haeler as being for the Union. Howland, himself, testified that Haeler had told him at his work bench he was against the Union; Lawler at a later date told Howland that Haeler had said he would not like to see a union at the plant, that the union would bring about a mess, but that subsequently Lawler told Howland that Voegeli had stated that Haeler had signed an authorization card [R. T. 1550, line 4, to R. T. 1551, line 1].

42. *Harrison:*

Howland listed Harrison on Respondent's Exhibit #7 as being for the Union. Howland testified that though he had a number of "kidding" conversations with Harrison, since he did not have any information to feel that he was against the Union, he therefore listed him as being for the Union [R. T. 1167, lines 14-18].

43. *Hibbard:*

Because he was in the indirect personnel group, Hibbard was not listed on Respondent's Exhibit #7. However, prior to the meeting of March 15, Hibbard told both Fink and Howland, separately, that he would not pay dues to anyone and that he would rather quit than work in a union shop. He was quite outspoken against the Union [R. T. 787, lines 15-16; R. T. 1172; lines 1-8].

Berno testified that Hibbard, a draftsman in Engineering, came to him in March and told him there were Union activities going on in the plant and wanted to know whether Berno and he were included. Berno answered that as far as he knew, all the people who punched the clock were included. Hibbard said, "I'm not paying any damned dues to anybody. I don't pay for a job." [R. T. 1735, line 17, to R. T. 1736, line 1]. The same day, Howland met Berno in the plant and Berno told him what Hibbard had said [R. T. 1774, lines 10-18].

44. *Hinsch:*

Hinsch was listed undecided on Respondent's Exhibit #7 and there is no specific evidence as to why he was so listed.

45. *Hirschmann:*

Hirschmann was listed as being undecided on Respondent's Exhibit #7. Hirschmann was Bruno Zadnik's brother-in-law. Howland, at the meeting of March 15, told Fink that Zadnik had stated that Hirschmann was against the Union. Payton, however, had told Howland that he was unsure about Hirschmann. Howland, therefore, put Hirschmann down as being undecided [R. T. 1166, line 23, to R. T. 1167, line 3]. Moreover, Isak testified he had a conversation in German with Hirschmann at his lathe and that Hirschmann said he did not think the Union could do him any good; Isak said he related this conversation to Howland a few days later [R. T. 1569, line 18, to R. T. 1570, line 11].

46. *Hoef:*

Hoef, who was an apprentice, was also listed as undecided on Respondent's Exhibit #7. Howland testified that he had a conversation with Hoef concerning the Union and that based upon what Hoef said, he thought Hoef was undecided. Howland further testified that Isak had said he had a conversation with Hoef wherein Hoef indicated to Isak he was against the Union. Nonetheless, Howland put him down as being undecided [R. T. 1334, lines 9-15].

Isak testified that in early March he had a conversation with Hoef at his bench and Hoef told him that he, Hoef, did not care for the Union and did not think it could do him any good. Isak stated he related this conversation to Howland the same day [R. T. 1570, line 12, to R. T. 1571, line 3].

47. *Homnan:*

Homnan also was not on Respondent's Exhibit #7, as he was in the indirect category. Fink and Howland did discuss him on March 15, however, and they concluded that because they thought he could not read or write, there was no way of telling whether he would be for the Union, except that Fink was aware, based upon his discussions with people in the plant, that during this time the Union adherents were still working on Homnan to urge him to sign an authorization card [R. T. 785, lines 21-23].

48. *Howard:*

Howard, who was also indirect, was not on Respondent's Exhibit #7, and there is no evidence regarding his position by either Howland or Fink [R. T. 1167, line 5].

49. *Hughes:*

Hughes was listed as being for the Union on Respondent's Exhibit #7, and Fink could not recall a discussion regarding Hughes on March 15 [R. T. 878, lines 23-24].

50. *Hunt:*

Howland, on Respondent's Exhibit #7, marked Hunt down as being against the Union. Howland stated that Hunt told him by the jig bore that he, Hunt, was against the Union for a company of this size. Howland also stated that Payton told him that Hunt made the same statements to Payton [R. T. 1334, line 23, to R. T. 1335, line 2].

Hunt testified that at the end of February or the beginning of March, he had a conversation with Pay-

ton in the production area and told Payton that in his opinion he felt that the Respondent's shop did not need a Union [R. T. 1477, lines 13-16].

Payton corroborated both Hunt's and Howland's testimony, adding that Hunt had told him the first part of March that he was against the Union; that he, Hunt, had had experience with the Teamsters, and that Payton, in turn, related this conversation to Howland [R. T. 1678, line 2, to R. T. 1679, line 15; R. T. 1707, line 1, to R. T. 1708, line 4].

51. *Johnson:*

Howland listed Johnson as being for the Union on Respondent's Exhibit #7. Howland testified that he had no conversations with Johnson of a serious nature, but because Johnson associated with those who were for the Union, he figured he was also for the Union himself [R. T. 1323, lines 19-24]. Negrete testified that Johnson told him he was for the Union [R. T. 1608, line 18].

52. *Kastendick:*

Respondent's Exhibit #7 lists Kastendick as being for the Union. Fink testified that Howland told him on March 15 that either he or Lawler had spoken to Kastendick and Kastendick had said he was for the Union because it would better his trade. Howland testified that he told Fink what Kastendick had told him and said he was for the Union to better his trade [R. T. 1238, lines 19-20].

Lawler testified that Kastendick had made the same statements to him [R. T. 1551, lines 2-23].

Isak testified that in early March, Kastendick made similar statements to him [R. T. 1571, lines 4-24].

Negrete testified that Kastendick told him he was for the Union [R. T. 1608, line 16].

Berno testified that Kastendick had a conversation with him in which Kastendick advised Berno to learn German [R. T. 1781].

Kastendick denied talking to Isak, Lawler and Negrete. He did not deny talking to Howland. In light of the fact that Lawler, Isak and Negrete each testified creditably and clearly, the evidence would indicate that they did, as they testified, have such conversations.

53. *Kevelighan:*

Respondent's Exhibit #7 lists Kevelighan as being against the Union. Fink testified that on March 15, Howland stated he had told him he had had a conversation with Kevelighan in which Kevelighan had stated he had worked in other plants where there was a union and he, Kevelighan, didn't feel it would do Mechanical Specialties any good and, therefore, was against the Union [R. T. 856 to R. T. 857].

Howland testified on redirect examination that he had had such a conversation with Kevelighan, and Howland further stated that Payton, who knew Kevelighan well, told Howland that Kevelighan had made the same statements to him [R. T. 1320, line 11, to R. T. 1321, line 1].

Payton testified that Kevelighan told him he had belonged to a union in Detroit and had been in a strike and had lost more money than he had gotten, and didn't want a union [R. T. 1705, lines 7-10].

54. *Kimura:*

Kimura, a welder, was listed on Respondent's Exhibit #7 as being against the Union. Kimura, him-

self, testified that at the time authorization cards were being distributed, in the early part of March, he had a talk with Howland and he voluntarily told Howland he didn't want anything to do with the Union [R. T. 1439, line 14, to R. T. 1440, line 18].

Kimura also testified that he had a discussion with Isak during the same time and told Isak he wanted no part of the Union [R. T. 1440, line 10, to R. T. 1440, line 18].

Isak testified the latter part of February or early part of March that he had a discussion with Kimura in the welding area and Kimura told him that he, Kimura, did not need a union, or anyone to bargain for him, that he could take care of himself. A few days later, Isak related this conversation to Howland [R. T. 1571, line 25, to R. T. 1572, line 14].

55. *I. Klein:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that Klein told him that he was for the Union [R. T. 1169, lines 15-16].

Isak testified that he had a conversation with Klein regarding Klein's losing money on a particular job, and behind in his due dates, and that Isak told him to stick to his job and not to do too much talking, that his job was a losing proposition, and that he, Isak, had seen him doing too much talking. Klein replied something to the effect that when he was working back East he did not have these kinds of problems. This conversation took place in early March [R. T. 1573, line 16, to R. T. 1574, line 12].

56. *T. Klein:*

Howland listed T. Klein on Respondent's Exhibit #7 as being undecided. At their meeting on March 15, Howland and Fink discussed the fact that in the conversations Howland had with Klein and based upon his association with Klein in this plant and in another plant for ten or eleven years, he just couldn't figure out which way Klein was going [R. T. 1165, lines 6-19]. Howland corroborated this testimony [R. T. 1325, lines 9-17].

Isak testified that in the early part of March, he had a couple of conversations with Klein and on one occasion, he said he was for the Union, but the next day he said he was against the Union. Isak told Howland about these conversations and indicated to Howland that Klein was being his usual self. Isak added that he could not ascertain what Klein's position was [R. T. p. 1572, line 15, to R. T. 1573, line 11].

57. *Knoles:*

Howland listed Knoles as being undecided on Respondent's Exhibit #7, but Fink added a "no" notation beside Knoles' name. Knoles testified that at the time the anti-union petition was being circulated, he had a talk with Fink. [R. T. 411, line 22, to R. T. 414, line 4]. Fink testified that the reason he put the "no" beside Knoles' name was that he had a conversation with him prior to March 15 when Knoles was in his office replacing a lamp. Knoles told him he was not for the Union, stating that he had once worked for a trucking line and was in the Union, but felt that because of his age, the Union could do him no good [R. T. 778, lines 15-25; R. T. 867, line 6, to R. T. 868, line 4]. Howland testified that Knoles told him that because of

Knoles' age, he felt the Union couldn't do him any good, but because Knoles also said he had belonged to a Union before, Howland, exercising caution, put him down as undecided [R. T. 1331, lines 1-6].

58. *Kocsis*:

Respondent's Exhibit #7 lists Kocsis as being against the Union. At their meeting of March 15, Howland told Fink that on various occasions, Kocsis had told Howland he was against the Union and that Payton had also told Howland that Kocsis had told him that he was against the Union [R. T. 1163, lines 3-7].

Isak testified that he had conversations in March with Kocsis at his machine, wherein Kocsis had told him he did not care for or want the Union. Isak related these conversations to Howland [R. T. 1574, line 15, to R. T. 1575, line 10].

Payton testified that Kocsis had a conversation with him around the first of March at the boring mill and that Kocsis told Payton that he had belonged to unions in the East but preferred not to belong to them again, and would vote against the Union. Payton related this conversation to Howland [R. T. 1680, line 15, to R. T. 1681, line 18; R. T. 1708, lines 5-11].

59. *Kofink*:

Howland listed Kofink as being undecided on Respondent's Exhibit #7, but Fink added a "no" notation beside Kofink's name.

Kofink testified that he attended the Union meeting on February 28, and that some time following the meeting he had a talk with Fink and indicated to Fink he was not for the Union [R. T. 506; R. T. 511].

The reason Fink put a "no" beside Kofink's name was that Kofink had told him that he had had experiences with unions in Germany and that was the reason he left the country [R. T. 780, line 2-8].

Isak testified that he had conversations with Kofink in German around the middle of March and that Kofink told him he was fed up with the Union and did not like what the Union was doing in the plant. Isak repeated this conversation to Howland [R. T. 1575, line 11, to R. T. 1576, line 4].

60. *Kojaku:*

Kojaku was not listed on Respondent's Exhibit #7 as he is in the indirect personnel group. He was, however, discussed along with other indirect personnel by Howland and Fink at their meeting of March 15 [R. T. 1170 to R. T. 1171]. Fink recalled Howland stating that Kojaku was very quiet and never said much one way or the other and felt he was undecided [R. T. 924, lines 19-21].

61. *Kruse:*

Kruse was not listed on Respondent's Exhibit #7 as he was indirect personnel. At the meeting between Fink and Howland on March 15, however, he was discussed [R. T. 1170 to R. T. 1171]. Howland told Fink that he was not for the Union because in his position it would not do him any good but would hurt him. Howland also mentioned, according to Fink's testimony, that Berno stated the same thing to Howland regarding Kruse [R. T. 786, line 21, to R. T. 787, line 12; R. T. 886, lines 1-15].

Howland testified that Kruse told him that the Union couldn't do him any good and that he was against it [R. T. 1171].

Berno stated that he had had a conversation around the first of March, and that Kruse had told Berno that Amthor had said to Kruse that the Union organizers had been bugging him (Amthor) to sign a card, and that he, Kruse, told Amthor not to pay any attention to that. Kruse said that he did not want the Union to come into the shop, that it wouldn't do him any good. Later that day, Berno told Howland of this conversation [R. T. 1737, line 18, to R. T. 1738, line 2].

62. *Kuhmann:*

Kuhmann, probably inadvertently, was not listed on Respondent's Exhibit #7. He testified that, a few days after he signed his authorization card, he had had a talk with Payton, and told Payton that he was against the Union because of the seniority provisions that the Union would probably want. Kuhmann said he had heard about the seniority matter from someone outside of the plant [R. T. 564, line 1, to R. T. 565, line 6; R. T. 566, line 16, to R. T. 568, line 9].

At their meeting on March 15, Howland stated that Payton had said that Kuhmann told him that he would quit his job if the Union came in [R. T. 786, lines 7-13]. Payton testified that he had a conversation with Kuhmann around the first of March, and that Kuhmann had called him over to his lathe. Payton testified that Kuhmann did not speak very good English but told Payton he did not want the Union to come in, adding that as a foreigner, "There are many foreign people for the Union, and if they know you don't send a card in they put pressure on you." Payton said that they couldn't put pressure on him, and Kuhmann said that at any rate, he was against the Union because of the seniority provisions.

Payton told Howland of this conversation and of Kuhmann's statement that pressure was being applied him that same day [R. T. 1682, line 21, to R. T. 1683, line 5].

63. *Harold A. Lamb:*

Respondent's Exhibit #7 lists Harold A. Lamb, a tool maker, as being against the Union. While there is some confusion in the testimony about this employee and another employee named Herbert F. Lamb, the testimony indicates that at the meeting of March 15, Howland told Fink that Zeman had told Howland that Lamb was against the Union [R. T. 1168, lines 24-25]. Zeman, himself, testified that he had a conversation with this employee in early March during a coffee break at his bench. Another employee, Pashone, was present. Both Pashone and Lamb said there was a lot of union signing up going on and each of them said that they were against the Union. Though Zeman did not say anything to them, he related what he had heard to Howland in early March [R. T. 1622, line 21, to R. T. 1623, line 23].

64. *Herbert F. Lamb:*

Respondent's Exhibit #7 lists Herbert F. Lamb as being undecided. Fink testified that at the meeting of March 15, both he and Howland discussed Lamb whom they had known for many years. They believed and stated that Herbert F. Lamb was the type of individual who one could never be certain about [R. T. 868, lines 5-14]. Howland testified that he had a conversation with Lamb wherein Lamb stated he was against unions but that the Union was putting pressure on him to

join up. Since Howland knew that Lamb was associating with employees who were sympathetic with the Union, he decided to put H. F. Lamb down as undecided as he would tell Howland one thing but his actions would reflect another [R. T. 1331, lines 7-13]. This employee also told Negrete that he was for the Union [R. T. 1608, lines 10-18].

Lamb, called on rebuttal by the General Counsel, testified that he did not have any talk with Zeman. However, Zeman's talk was with Harold Lamb. He agreed he had a talk with Howland but could not recall telling Howland that the Union was putting pressure on him [R. T. 1793].

65. *Lary:*

Lary, as an "indirect" employee, was not listed on Respondent's Exhibit #7 but was discussed between Fink and Howland. Fink testified that Lary told him that he had been a carpenter in the motion picture industry, that he made good money when he was working, but he wasn't working very often. Therefore, he did not want to belong to a union [R. T. 788, lines 10-16]. Howland testified that Fink told him about his conversation with Lary on March 15 [R. T. 1171, lines 18-25]. Berno also testified that Lary made the same statements to him and that soon thereafter, Berno related this conversation with Lary to Howland [R. T. 1738, line 13, to R. T. 1739, line 4].

66. *Lawrence:*

Howland listed Lawrence on Respondent's Exhibit #7 as being against the Union. Howland told Fink on March 15 that Lawrence had told him that, he,

Lawrence, had been in unions before but that in a company the size of Respondent's, he did not see any need for the Union but that if the Union got in, he would join because he had to work with the rest of the employees. Howland also said that Negrete had a similar conversation with Lawrence which he related to Howland [R. T. 1163, line 21, to R. T. 1164, line 3; R. T. 1324, line 22, to R. T. 1325, line 8].

Lawrence, himself, testified that during the period that authorization cards were being distributed, he had a talk with Negrete in which he told Negrete that he was going to vote against the Union although if the Union did get in, he would join [R. T. 1482, lines 6-17]. Negrete testified that he had a conversation with Lawrence at the latter's bench the first part of March. Lawrence had called him over and told him that the Union activity was going around but Lawrence did not think the Union was good for job shops, that if it got in he would join; he would not fight it. Negrete related this conversation to Howland [R. T. 1600, line 13, to R. T. 1601, line 7; R. T. 1612, line 14, to R. T. 1613, line 1].

67. *Letts:*

Respondent's Exhibit #7 lists Letts as being against the Union. Howland, himself, was uncertain where he obtained his information but believed it came from Woods [R. T. 1169, lines 1-4]. Woods testified that in the latter part of February or beginning of March, he had a conversation with Letts wherein in the course of it, Letts advised him that there was a lot of Union activity going on. Letts stated that he hoped the Union would not get into Mechanical Specialties, that he had

had experience with unions before and mentioned Alba Engineering. Woods related this conversation to Howland on the same day [R. T. 1530, line 21, to R. T. 1531, line 22]. Woods also testified that he had other conversations during this period of time with Letts and that Letts had blamed the downfall of Alba Engineering on the Union [R. T. 1542, lines 11-23].

68. *Mancini:*

Mancini was listed as being against the Union on Respondent's Exhibit #7. Mancini, himself, testified that in the latter part of February or beginning of March, he had a talk with Payton in the inspection room and he told Payton that he was against the Union [R. T. 1486, line 7, to R. T. 1487, line 2; R. T. 1488, lines 2-17]. Payton testified to this conversation with Mancini, confirming the fact that it was in the first part of March and confirming the fact that Mancini clearly stated he was against the Union. That same evening, Payton related his conversation with Mancini to Howland [R. T. 1683, line 6, to R. T. 1684, line 25].

69. *Mansfield:*

Howland listed Mansfield as being against the Union on Respondent's Exhibit #7. Mansfield, himself, testified that in early March, after the time he signed his card but long before he sent it in, he had a conversation with Payton, his supervisor, in which he told Payton he was against the Union [R. T. 628, lines 11-17]. Howland testified that Payton related this conversation to him and that he, in turn, mentioned it at the meeting of March 15 [R. T. 1239, lines 14-16].

Payton testified to his conversation with Mansfield which he recalled as being approximately in the last part of February. He stated that Mansfield told him he was against the Union, that he had been a member of a union in San Diego but could see no reason for a union at Mechanical Specialties. The following evening, Payton related this conversation to Howland [R. Tr. 1684, line 26, to R. T. 1685, line 24].

70. *Mellone:*

Respondent's Exhibit #7 lists Mellone as being undecided. This employee was discussed between Fink and Howland on the evening of March 15 and it was pointed out between them that Mellone was an articulate type person and a person that would go into detail in anything he would do. Based upon that understanding of Mellone, he was felt to be undecided [R. T. 869, lines 7-12]. Isak, Mellone's supervisor, may have passed the same information along to Howland [R. T. 1331, lines 15-21].

71. *Meier:*

This employee was marked as being for the Union on Respondent's Exhibit #7. Howland could not recall anything that was said about him on the evening of March 15 [R. T. 1167]. At the time of the hearing, he was in Oregon [R. T. 1739 to R. T. 1740].

71. *Moran:*

Respondent's Exhibit #7 lists Moran as being against the Union. Howland testified that he told Fink on the evening of March 15 that Moran had told Howland in the welding booth that he did not want anything to do with the Union based upon his experi-

ences with unions in Scotland. Howland further testified that Isak, Moran's supervisor, had a similar conversation with him [R. T. 1167, lines 19-22; R. T. 1325, line 20, to R. T. 1326, line 9].

Isak testified that he had a conversation in the welding area in the latter part of February with Moran [incorrectly transcribed at times as Morrow], who told him that he had worked for unions in England and Scotland and that he did not care for unions. Isak related this conversation to Howland the same day [R. T. 1576, lines 5-23].

73. *Morris:*

Morris was listed on Respondent's Exhibit #7 as being against the Union. Fink testified that on the evening of March 15, Howland told him that Morris was a strong conservative and that Morris had stated he was against the Union [R. T. 879, lines 18-25]. Isak stated that he had conversations concerning the Union in the early part of March with Morris and that during these conversations, Morris had stated that he did not care for the Union and that, "As a young American I don't believe in that stuff." Morris told Isak that he was against the Union and on the same day or within a few days, Isak related this conversation to Howland [R. T. 1576, line 24 to R. T. 1578, line 13]. Morris confirmed the fact that at the beginning of the campaign, he had a conversation with Isak in which he told Isak he was against the Union, that he thought it was a big farce. He also stated that he had conversations with Howland in which he told Howland he was definitely against the Union [R. T. 1405, line 18, to R. T. 1408, line 19].

74. *Morrow:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that Zadnik had told him that Morrow was for the Union and Howland, himself, had seen him in close company with openly avowed Union adherents [R. T. 1335, lines 12-15].

75. *Myer [Meyer]:*

Howland listed Meyer as being against the Union. He told Fink on the evening of March 15 that Payton had told him that Meyer had stated he was against the Union [R. T. 1166, lines 2-3].

Payton testified that he had conversations with Meyer at the beginning of Union activity and that Meyer had told him that he hoped the Union did not get in, that he was against the Union. He further told Payton that if the Union got in, he would quit. The following day, Payton related this conversation to Howland [R. T. 1686, line 12, to R. T. 1687, line 5].

76. *G. Neumann:*

This employee was listed as being for the Union on Respondent's Exhibit #7. Howland testified that though he did not have any particular discussions with him regarding the Union but because he was Karl Neumann's brother and Karl Neumann was openly for the Union, he thought Gunther would be too [R. T. 1167, line 23, to R. T. 1168, line 1].

77. *Karl Neumann:*

Karl Neumann was listed as being for the Union on Respondent's Exhibit #7 and Howland testified that he

openly made known his pro-union activity [R. T. 1167 to R. T. 1168].

78. *Nowak:*

Respondent's Exhibit #7 lists this employee as being against the Union. On March 15, Howland told Fink that Isak, Nowak's foreman, said that Nowak was against the Union [R. T. 1166, lines 8-10]. Isak testified that Nowak told him in early March that based upon his experiences in Germany, he, Nowak, did not believe in the Union, was against it, and that he did not sign a card. Nowak further told Isak that Booze, [Kirk] Riegler, Kofink and Voegeli were against the Union and that Ahlstrom and Klein were very strong and for the Union. Isak related this conversation in the early part of March to Howland [R. T. 1565, line 18, to R. T. 1567, line 19].

79. *Christopher Odell [Odell Christopher]:*

This employee was not listed on Respondent's Exhibit #7 as he was the sweeper in the front office. Testimony indicates that in the beginning of March, Payton had a discussion with him wherein Odell [O'Dale] indicated that he was thinking of voting for the Union. Payton related this to Howland [R. T. 1689, line 6, to R. T. 1690, line 4].

80. *O'Kane:*

O'Kane is not listed on Respondent's Exhibit #7 as he, a truck driver, was not considered a "direct" employee. Neither Fink nor Howland knew much about this individual and could not determine his position for poll purposes. [R. T. 786, lines 4-6].

81. *Osdale:*

Respondent's Exhibit #7 lists Osdale as being undecided. Zeman testified that he told Howland that in the discussions he had with Osdale, Osdale indicated to him that he was undecided [R. T. 1624, lines 2-8].

82. *Pashone:*

Respondent's Exhibit #7 lists Pashone as against the Union. On March 15, Howland told Fink that Zeman, Pashone's leadman, had told Howland that Pashone stated he was against the Union [R. T. 1165, lines 20-22]. Pashone, himself, testified that at the time cards were being distributed, none was given to him because it was well known he was against the Union [R. T. 1508, line 22, to R. T. 1509, line 3]. During the same period of time, he had a discussion with other employees concerning the Union and during this discussion, Zeman was present. Pashone testified that at that time he stated he was against the Union as did some other employees, including Grice and Whiteman [R. T. 1509, line 5, to R. T. 1510, line 5].

Zeman testified to being present during a conversation wherein both Pashone and Harold Lamb told him that they were against the Union. This was in early March and Zeman related this conversation to Howland [R. T. 1622, line 21, to R. T. 1623, line 23]. Zeman further testified that in addition to that conversation, there was another conversation in early March, had during a coffee break, where Pashone and Grice stated they were against the Union, that they did not want to see a Union in the shop. Zeman also related this conversation to Howland [R. T. 1624, line 17, to R. T. 1626, line 4].

83. *Patterson:*

Respondent's Exhibit #7 lists Patterson as being for the Union. Howland testified that he was a fairly new man but because he was in the classified department and most of the people in the classified department appeared to be for the Union, he figured Patterson was as well [R. T. 1169, lines 10-15].

Lawler, though he had no conversations with Patterson, concluded that Patterson was for the Union for the same reason that Howland formed the same opinion and so told Howland [R. T. 1551, line 24, to R. T. 1552, line 22].

84. *Poirier:*

Howland listed Poirier on Respondent's Exhibit #7 as being against the Union. Howland testified that Woods had told Howland that Poirier was a staunch conservative and was against the Union because of his political beliefs [R. T. 1324, lines 14-21].

Woods testified that he had a number of conversations with Poirier concerning the Union, some of which were prior to any Union activity, that Poirier was a member of the John Birch Society and that he had told Woods of his sad experiences with the union at North American Aviation. When union activities began, Poirier repeated his experience at North American to Woods and told Woods he was "violently opposed" to the Union at Respondent's plant. Woods related this conversation to Howland the same day [R. T. 1531, line 23, to R. T. 1534, line 2]. At the time of the hearing, Poirier was in Texas [R. T. 1739, to R. T. 1740].

85. *Polony:*

Howland listed Polony as being undecided on Respondent's Exhibit #7 but Fink had a "no" notation beside Polony's name. Fink testified that he had had a conversation with Polony wherein Polony told him that he had worked in Chicago and at North American where they were unionized and he felt that a shop of Respondent's size did not need a union [R. T. 779, lines 20-25].

Howland testified that he had several discussions with Polony by his machine and that Polony indicated he was undecided. Negrete, however, a couple of days later, according to Howland, informed Howland that Polony was against the Union because of prior associations with them. Being extremely cautious, Howland put Polony down as being undecided [R. T. 1333, line 24, to R. T. 1334, line 7]. Negrete testified to his conversations with Polony around the first of March. On one occasion, Polony called him over and told him that he had been to a meeting but that he was not for the Union because the Union had nothing to offer him and that the Company had been good to him. Approximately a week later, Negrete told Howland about his conversations with Polony as well as other employees under his supervision [R. T. 1601, line 8, to R. T. 1602, line 11].

Polony, himself, testified that during the same period of time, the end of February or beginning of March, he had a discussion with Negrete and told Negrete he was not in favor of the Union; that he was waiting to see what they had to offer; that he had been a member before and that he had no particular reason to campaign for them. He further testified that around this time

he had a talk with Howland and he told Howland he was confused about the Union and indicated he was undecided. During the same period of time, he had a talk with Fink and he told Fink the Union did not have anything to offer so he was not for the Union [R. T. 1375, line 10, to R. T. 1377, line 6].

86. *Proudfoot*:

This employee was listed as being against the Union on Respondent's Exhibit #7. He, himself, testified that it was "quite possible" that he had a talk with Bert Woods concerning the Union at the beginning of the Union campaign.

Fink testified that on the evening of March 15, Howland told him that Proudfoot and Woods were close friends, each having come from Scotland and that Woods had reported to Howland that Proudfoot was against the Union. Howland, in his testimony, affirmed the fact that Woods had told him that Proudfoot had stated he was against the Union and did not want any part of it [R. T. 876, lines 17-23; R. T. 1332, lines 16-21].

Woods testified that he had long known Proudfoot and had visited him in his home socially and he had discussed the Union with him in the latter part of February or beginning of March. Proudfoot had brought up the subject and had told Woods that he was against the Union in Respondent's plant, mentioning his union background in Scotland at the time. Woods related this conversation to Howland either that evening or the next morning [R. T. 1534, line 3, to R. T. 1535, line 22].

87. *Rawl*:

On Respondent's Exhibit #7, Rawl was listed as "against—weak". Howland told Fink that Payton had

said that Rawl was against the Union but Howland had talked to Rawl and had gotten a different impression and, therefore, added the word "weak" to the opinion that he was against the Union [R. T. 1168, lines 10-14]. Apparently, Howland misinterpreted or was confused as to what Payton had said for Payton testified that shortly before March 14, Rawl had voluntarily stated to Payton that he was for the Union and that Payton had related this conversation to Howland [R. T. 1687, lines 6-21]. Howland's impression from his talks with Rawl apparently was correct.

88. *Rhedin:*

This employee, who was the tool crib man and therefore among the indirect group, was not listed on Respondent's Exhibit #7. It appears that his name was discussed along with other indirect personnel between Fink and Howland [R. T. 1170, lines 12-17].

Rhedin, himself, testified that he had a talk with Lawler around the time he signed the authorization card and that he told Lawler he did not want to have anything to do with the Union. He also had a talk with Berno and told Berno he was against the Union [R. T. 1451, lines 2-23]. Lawler testified that in the latter part of February, Rhedin called him over to the tool crib and told him that he was against the Union, adding that he had worked in a plant where there was a union and that he had lost his job. Later that evening, Lawler related his conversation with Rhedin to Howland [R. T. 1552, line 23, to R. T. 1553, line 17]. Berno also testified that at the end of the Union meeting on March 14, he spoke to Rhedin who came over to him and told him that he was there to find out what was

going on but that he had no use for the Union because he was too old [R. T. 1724, line 23, to R. T. 1725, line 6].

89. *Riegler:*

Respondent's Exhibit #7 lists Riegler as being against the Union. Howland told Fink on March 15 that [Bruno] Zadnik had stated that Riegler had stated that he was against the Union in a shop the size of Respondent's [R. T. 1166, lines 19-22]. Fink added a "no" notation beside Riegler's name based upon his long association with Riegler [R. T. 783, lines 2-14].

Riegler testified that in February and March of 1965, he had discussions with Fink regarding the Union in which he told Fink he did not want a union in Respondent's plant and added that he hoped the Company would prevail against the Union. He also stated that he had told Isak during the same period of time that he was against the Union [R. T. 1389, line 1, to R. T. 1390, line 10; R. T. 1393, line 2, to R. T. 1395, line 4]. Isak testified that Riegler spoke to him at the end of February and in German told him that he was against the Union. Isak is a close personal friend of Riegler's. Isak also testified that Riegler told him he attended a Union meeting some time at the end of February and that he, Riegler, was not impressed by what he had heard. Isak related this conversation to Howland [R. T. 1562, line 3, to R. T. 1563, line 25; R. T. 1579, lines 4-17].

90. *Schlapp:*

Respondent's Exhibit #7 lists Schlapp as undecided; however, the record shows that Isak testified that in early March he had a conversation with Schlapp in

German wherein they talked about the job and other things and the Union was raised and Schlapp said he didn't like the unions in Germany and didn't want to see a union at Mechanical Specialties. Within a few minutes thereafter, Isak related this conversation to Howland [R. T. 1579, line 18, to R. T. 1580, line 14].

91. *Scoggins:*

This employee, a janitor, was listed on Respondent's Exhibit #7 as being for the Union. Zeman, however, testified that in the latter part of February, Bradley told Zeman that he was against the Union and that another employee, Scoggins, was also against the Union. At the end of February, Zeman related his conversation with Bradley concerning Scoggins to Howland [R. T. 1620, line 16, to R. T. 1621, line 18]. Bradley, himself testified that he did, indeed, tell Zeman in the latter part of February that Scoggins was against the Union and he told this to Zeman after talking to Scoggins [R. T. 1497, line 3, to R. T. 1498, line 9].

92. *Scovel:*

This employee was the night tool crib man and, therefore, in the "indirect" group and thus not on Respondent's Exhibit #7. However, on the evening of March 15, Howland told Fink that Scovel had said he was against the Union. Scovel testified that around the time he was asked to sign a Union authorization card, he had had a number of conversations with Walter Payton who was a personal friend of his and his supervisor. Scovel testified he told Payton that Respondent's was an exceptionally good company and that the Union would be detrimental to its operations that while he, Scovel, was not against unions as such, he did not think

that one was desirable in Respondent's plant. During the same period of time, Scovel had a conversation with Berno and volunteered to Berno that he was against the Union [R. T. 1493, line 6, to R. T. 1494, line 18].

Payton testified that around the first of March he had a talk with Scovel at the tool crib. Scovel had called him over and told him that he, Scovel, had belonged to a union at Aerojet; that he did not think Respondent needed a union and that Respondent had done a lot for him. Payton related his conversation with Scovel to Howland the following evening [R. T. 1688, line 2, to R. T. 1689, line 6]. Berno stated that he had frequent conversations with Scovel around this period of time and that Scovel had said that he was against the Union; Berno did not recall whether he told Howland about these conversations [R. T. 1773, lines 6-18].

93. *Senyk:*

Respondent's Exhibit #7 lists Senyk as being against the Union, his name having been added to the bottom of the list during the meeting of March 15 [R. T. 784, lines 3-7]. At that meeting, Howland told Fink what Isak had told him that Senyk had said he was against the Union [R. T. 1169, lines 22-23]. Senyk, himself, testified that on or about March 11, 1965 (when he returned to work from a long absence), he had a talk with Isak whom he had known for a number of years and that he, Senyk, told Isak he was against the Union [R. T. 1402, line 15, to R. T. 1403, line 17]. Isak testified that he had a conversation with Senyk around the middle of March and Senyk had said that at the last place he worked there was a Union that he did not care for it and that he was against the Union in this plant.

Isak related this conversation to Howland [R. T. 1580, line 15, to R. T. 1581, line 6].

94. *Seymour:*

Seymour was an indirect employee and, therefore, not listed on Respondent's Exhibit #7. He was, however, discussed between Fink and Howland at the meeting of March 15 where it was stated that Seymour had said that he was an older man and did not see what good the Union could do him [R. T. 785, lines 8-13]. Seymour, himself, testified that at the time he signed his card, in order to be on a friendly basis with his fellow employees, he told Berno that he was not in favor of the Union. Berno confirmed the fact that just prior to attending the meeting of March 14, Seymour told him that he was against the Union [R. T. 1443, lines 7-16; R. T. 1772, lines 2-25].

95. *Smith:*

Howland listed Smith, an apprentice, as against the Union on Respondent's Exhibit #7. Howland testified that he talked to Smith in the main plant area and that Smith expressed the fact that he didn't think the Union could do him any good because he was an apprentice. Howland also testified that Isak told him that Smith had told Isak that he was against the Union [R. T. 1324, lines 1-13]. Negrete testified that he had a talk with Smith at Negrete's bench in March and that after discussing the apprenticeship program in general, Smith wanted to know what the Union had to offer in regard to an apprenticeship program. Negrete said he did not know and Smith said, "I don't think the Union could do me anything good." [R. T. 1602, line 12, to R. T. 1603, line 6].

96. *Stow:*

This employee was in the indirect group and not on Respondent's Exhibit #7. On the evening of March 15, Stow was discussed. Both Fink and Howland considered him to be against the Union. Fink recalled Stow stating that he, Stow, was very happy with his job and didn't see how the Union could help him in any way [R. T. 925, lines 1-5].

97. *Teiman:*

Respondent's Exhibit #7 lists Teiman as being for the Union. Howland told Fink on March 15 that he felt Teiman to be for the Union because he had stated that the Union would be good for his trade [R. T. 878, lines 15-22; R. T. 1333, lines 13-17].

98. *Thiekotter:*

Respondent's Exhibit #7 lists Thiekotter as being undecided. Isak testified that he had a conversation with Thiekotter in the early part of March in German and that Thiekotter stated that maybe he would get more money if the Union came in but on the other hand, he stated he did not care for the Union. This left Isak with the impression that Thiekotter was undecided and he so told Howland [R. T. 1581, lines 7-25].

99. *Thomas:*

This employee was also in the indirect group and was not included in Respondent's Exhibit #7. Fink told Howland at the meeting of March 15 that Thomas had said he was against the Union. Fink testified that he believed Thomas had spoken to Howland and Berno stating the same thing [R. T. 785, lines 14-17].

Fink recalled Berno telling Fink about his conversation with Thomas but did not recall when [R. T. 884, line 20, to R. T. 885, line 13]. Fink also testified that as late as March 15 the Union was still working on some employees trying to get them to sign authorization cards and that one of these employees was Johnny Thomas who told him about this [R. T. 956, lines 1-13]. Howland testified that Thomas told him at the tool crib that he was against unions for political reasons [R. T. 1337, lines 13-17]. Berno testified that in the latter part of February or beginning of March, Thomas, who had expressed conservative political views on many occasions, told Berno that he was against the Union. At another time, Thomas told Berno that Ahlstrom was badgering him [R. T. 1768, line 11, to R. T. 1770, line 12].

100. *Twardowski:*

Twardowski is listed on Respondent's Exhibit #7 with the notation "unknown". Howland explained that the reason for this was that Twardowski had very recently been employed by Respondent and his feelings were not known [R. T. 1169, lines 19-21].

101. *Virgil:*

Respondent's Exhibit #7 lists Virgil a being undecided. Virgil, himself, testified on cross-examination that some time at the beginning of March he told Howland that he did not know whether he was for or against the Union and that he was undecided [R. T. 381, line 24, to R. T. 382, line 9].

On the evening of March 15, Fink recalls it being mentioned that Virgil was the type of individual that moved from one job to another and it was difficult to

determine whether he was for or against the Union [R. T. 870, lines 9-15].

102. *Voegeli*:

Howland listed Voegeli as being for the Union on Respondent's Exhibit #7. At the meeting of March 15, Howland told Fink that Voegeli had said that the Union would help him in his trade. Howland confirmed Fink's testimony and stated that Lawler had told Howland that Voegeli had made such statements to Lawler [R. T. 870, line 21, to R. T. 872, line 9; R. T. 1321, line 3, to R. T. 1322, line 4].

Lawler testified that Voegeli told him he was in favor of the Union [R. T. 1553, lines 18-25]. Negrete testified that he had a conversation with Voegeli at the end of February where Voegeli urged him to "get on the Union bandwagon" and he told Negrete that the Union was going to "organize all of Southern California." When Negrete joshed with him and indicated that he wasn't particularly interested in the Union, Voegeli said, "We will take care of you, anyway." Negrete described Voegeli as a very good friend [R. T. 1605, line 10, to R. T. 1606, line 1].

103. *Vogl*:

Howland listed this employee on Respondent's Exhibit #7 as being against the Union and Fink added the notation "no", meaning that he, also felt Vogl was against the Union.

Vogl, himself, testified on cross-examination that some time in March or April, he had a conversation with Howland in which he told Howland, "I don't need anything like the Union, I can take care of myself."

[R. T. 557, line 15, to R. T. 558, line 14]. Fink testified that the reason he put the notation "no" after Vogl's name was that prior to that time, he had spoken to Vogl and Vogl had said to him, "I can handle my own battles. I don't need a third party to do any deciding for me." [R. T. 781, lines 19-25]. Howland testified that he had had a conversation with Vogl where Vogl had stated that he did not need anyone else to bargain for him, that he could handle his own problems [R. T. 1335, lines 3-6].

104. *Watts:*

This employee was an indirect employee and, therefore, not listed on Respondent's Exhibit #7. At the meeting of March 15, Watts was discussed and Fink testified that it was mentioned that Bill Leslie, the Company estimator, had told Fink that Watts was certainly against the Union, that Watts had stated that he remembered what had happened at another company, Falco, and that he, Watts, was against the Union [R. T. 787, line 20, to R. T. 788, line 9].

105: *Welch:*

Howland listed Welch as being for the Union on Respondent's Exhibit #7. Howland testified that Welch had said that the Union would better his trade and that Lawler had told Howland that Welch had said the same thing to him [R. T. 1332, lines 3-7].

106. *Robert (Uwe) Weymar:*

Respondent's Exhibit #7 lists U. Waymar (Robert) as being undecided. Weymar, himself, testified that he had a talk with Howland in March where he made statements both for and against the Union and where he

indicated to Howland that he was undecided [R. T. 523, lines 15-21; R. T. 525, line 19, to R. T. 527, line 11].

107. *Rolf Weymar:*

Respondent's Exhibit #7 lists Rolf Weymar as being for the Union with the added comment "weak". Fink testified that at the meeting of March 15, Howland stated that Rolf Weymar was a friend of Karl Neumann and that Neumann was apparently for the Union and Howland felt that Weymar would be as well. Howland testified that he had a conversation with Rolf Weymar and that based upon that conversation, he considered Weymar to be leaning toward the U.A.W. but not strong in his belief [R. T. 877, lines 9-21; R. T. 1332, line 25, to R. T. 1333, line 4].

108. *Whiteman:*

Respondent's Exhibit #7 lists Whiteman as against the Union. Howland testified that Whiteman, at his bench in the production area, prior to March 15, told Howland that he was concerned about the Union coming into the plant and that based upon his past experiences, he did not want the Union. Howland also testified that Zeman had told him that Whiteman told Zeman the same thing [R. T. 1332, line 23, to R. T. 1323, line 15].

Whiteman testified that at the beginning of the Union organization campaign, Voegeli approached him with Union literature which he refused to take. Around the same time, Whiteman told Howland and "anyone else that would listen" that he emphatically rejected the Union [R. T. 1434, lines 12-25]. He also testified that he spoke to Zeman about the Union at the "beginning, during, and all around" the campaign [R. T.

1435, lines 1-7]. Zeman testified that approximately late February he had a conversation with Whiteman at his bench and Whiteman said that he did not sign a card and he was positively against the Union. In late February, Zeman related this conversation to Howland [R. T. 1626, line 5, to R. T. 1627, line 2].

109. *Wiley:*

There is no discussion of this employee in the record. It appears that he was sick during the period in question.

110. *Williams:*

Howland listed Williams as being undecided on Respondent's Exhibit #7. Both Fink and Howland agreed that Williams was the type of person who frequently changes his mind and, accordingly, he was listed as undecided [R. T. 872, line 23, to R. T. 873, line 3]. Lawler, however, testified that he often drove to work with Williams and that around the first of March, while driving to work, Williams told him that while the Union may be good for more money, he, Williams, was against the Union; that he had worked for unions back East and that he would not like to see one in Respondent's plant. Lawler related this information to Howland around the first of March [R. T. 1554, line 3, to R. T. 1555, line 10].

111. *Wilson:*

Respondent's Exhibit #7 lists Wilson as being for the Union. Fink testified that Wilson had indicated to either Howland or Lawler that Wilson had said he was for the Union [R. T. 873, lines 9-12]. Howland testified that Wilson told him he was for the U.A.W. to

improve his trade and Lawler stated that Wilson told him the same thing [R. T. 1322, lines 16-18; R. T. 1555, lines 11-20].

112. *Wright:*

Respondent's Exhibit #7 lists Wright as being for the Union. Howland had indicated that Wright had said he was for the Union because it would improve his trade [R. T. 874, lines 9-13; R. T. 1239, lines 5-10].

113. *Zadnik:*

Respondent's Exhibit #7, which lists Zadnik as a leadman, also indicates that both Howland and Fink considered him to be against the Union. Fink testified that he had known Zadnik for 12 to 15 years and based upon his knowledge of the individual, he felt that Zadnik was against the Union. Howland told Fink that Zadnik had told Howland that he, Zadnik, was against the Union [R. T. 783, lines 2-7; R. T. 1166, lines 16-18]. At the time of the hearing, Zadnik was in Oregon [R. T. 1739, to R. T. 1740].

114. *Zirbel:*

Respondent's Exhibit #7 lists Zirbel as being undecided and Howland, himself, based upon his conversations with Zirbel, was unclear as to Zirbel's position; however, Howland stated that Negrete told him that Zirbel stated he was happy the way things were going in the plant [R. T. 1332, lines 8-15].

Negrete testified that in the latter part of February or beginning of March, he had a number of conversations with Zirbel. Zirbel had asked him a number of questions as to what the Company was going to do regarding the Union and Negrete said he did not know.

Based upon these discussions, Negrete concluded that Zirbel was against the Union and so told Howland, Negrete further based his opinion on knowing Zirbel for a number of years [R. T. 1603, line 10 to R. T. 1604, line 18].

APPENDIX D.

Pertinent Statutory Provisions.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least

a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in

the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX E.

(Pursuant to Rule 18(f) of the Rules of Court.)

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
1(a)-1(o)	5	5	
1(p)	6	6	
2	34		
3	40	42	
4	42	43	
5	44	44	
6	45	45	
7	46	47	
8	50		722
9	51	818	722*
10	53	53	
11	53		722
12	55		723
13	56		723
14	57	894	723*
15	58	725	
16	58		725
17(a) & (b)	59	725	
18	60		726
19	60	727	
20	62	727	
21	66	728	
22	84	86 728	
23	88		
24	89	729	
25	119	120	
26	113	135	
27	133	135	
28	272	273	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
30	389	390	
31	408	409	
32	410	412	
33	426	427	
34	480	482	
35	623	626	
36	696	697	
37	699	699	
38	704	705	
39	705		
40	193	193	
41	194	194	
42	195	195	
43	196	196	
44	196	196	
45	198	198	
46	199	199	
47	581	581	
48	200	200	
49	201	201	
50	201	201	
51	202	202	
52-1	203	203	
52-2	203	203	
53	204	204	
54	204	204	
55	588	588	
56	205	205	
57	206	206	
58	206	206	
59	207	207	
60	208	208	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
61	209	209	
62	210	210	
63	210	210	
64	211	211	
65	211	211	
66	212	212	
67	217	217	
68-1 & 68-2	571	571	
69	220	220	
70	221	221	
71	222	222	
72	222	222	
73	223	223	
74	224	224	
75	225	225	
76	226	226	
77	227	227	
78	228	228	
79	228	228	
80	229	229	
81	230	230	
82	231	231	
83	234	234	
84	235	235	
85	235	235	
86	236	236	
87	237	237	
88	238	238	
89	238	238	
90	239	239	
91	240	240	
92	240	240	

General Counsel's Exhibits.

No. 1(a)-109(c)	Identified	Received	Rejected 8
93	242	242	
94	242	242	
95	243	243	
96	244	244	
97	245	245	
98	245	245	
99	246	246	
100	272	273	
101	717	720	
102	1186		
103	1200	1200	
104(a)(b)(c)	1253	1258	
105(a)(b)(c)	1258	1287	
106	1286	1286	
107	1286	1287	
108	1288	1290	
109(a)(b)(c)	1289	1290	

*Exhibits No. 9 and 14 were initially rejected by the Trial Examiner, who later reconsidered and then received them.

**Employer
Mechanical Specialties**

No. 1-23	Identified	Received	Rejected
1	163		171
2(a)(b)(c)	330		
3	403		
4	758	759	
5	760	761	
6	770	771	
7	774	789	
8	830		
9	835	839	
10	846	850	
11	1030	1031	
12	1100	1100	
13	1101	1101	
14	1104	1104	
15(a)	1123	1126	
15(b)	1123	1126	
15(c)	1123	1126	
15(d)	1123	1126	
16		1196	
17	1127	1127	
18	1303	1303	
19(a)(b)(c)	1309	1309	
20(a)(b)(c)	1310	1310	
21	1312	1312	
22(a)(b)(c)	1312	1312	
23	1340		1341

Charging Party

No. 2	Identified	Received	Rejected
1	1347	1354	
2	1803	1804	

COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS F. BOYLE, JR., et al.,)
Appellants,)
vs.)
FRED R. DICKSON, et al.,)
Appellees.)

No. 22539

BRIEF OF APPELLEES

FILED

APR 10 1968

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS F. BOYLE, JR., et al.,)	
)	
Appellants,)	
)	
vs.)	No. 22539
)	
FRED R. DICKSON, et al.,)	
)	
Appellees.)	
)	

BRIEF OF APPELLEES

JURISDICTION

The order of the United States District Court for the Northern District of California, dismissing appellant's complaint, in the proceeding entitled Thomas F. Boyle, Jr., et al. v. Fred R. Dickson, et al., No. 47799, was issued November 27, 1967. Appellants, state prisoners, purported to commence a class action based on claims alleged under Title 42, United States Code sections 1983 and 1985 (the Civil Rights Act), and sought the jurisdiction of the District Court under Title 28, United States Code section 1331, and 1343. Appellants also purported to invoke in the District Court the provisions of Title 28, United States Code sections 2281 and 2284 (convening a three judge court to enjoin

enforcement of a state statute). The jurisdiction of this Court is invoked under Title 28, United States Code sections 1291 and 1915.

STATEMENT OF THE CASE AND OF THE FACTS

On or about September 8, 1967 appellants filed a civil complaint in the District Court. Named as defendants are each of the members of the California Adult Authority, the California Adult Authority as a body, two parole agents individually and as agents of the Adult Authority, Ronald Reagan, Governor of California, the California Legislature as a body, and the People of the State of California.

On November 3, 1967 a motion to dismiss the action was filed on behalf of the defendants Ronald Reagan, the California Adult Authority, and the individual members thereof. On or about November 22, 1967, appellants filed a document entitled "Notice of Motions and Motions to Amend and in Opposition to Defendants' Motion to Dismiss." Appellees' motion to dismiss was argued on November 27, 1967 and on the same date the District Court dismissed the action with prejudice because the complaint failed to state a claim upon which relief can be granted.

On December 27, 1967 appellants filed a notice of appeal and the District Court ordered appeal in forma pauperis pursuant to Title 28, United States Code section

1915. On January 17, 1968 appellants' motion for counsel on appeal was denied by the District Court. Appellants' Opening Brief was filed March 11, 1968 and on March 17, 1968 appellants' request for the appointment of counsel on appeal was denied by this Court.

Appellants' complaint purports to allege five causes of action. The first cause of action contends the Adult Authority has been delegated quasi-judicial and quasi-legislative powers in violation of the Constitution. The second cause of action contends the procedures employed by the Adult Authority in determining violations of parole and revoking parole are unconstitutional. The third cause of action contends Adult Authority Resolution No. 171 is unconstitutional for several reasons. The fourth cause of action contends the parole officers mentioned only detrimental facts and failed to mention beneficial facts and circumstances when writing reports on parole violations and thereby have deprived appellants of their constitutional rights. The fifth cause of action contends appellants' constitutional rights are violated by the Adult Authority's exercise of its statutory power to fix and refix expiration dates of appellants' indeterminate sentences.

Appellants demanded relief by way of an injunction restraining the Adult Authority from enforcing

the California Indeterminate Sentence law and also by way of an award of damages totalling \$610,000.

The complaint was accompanied by a declaration of appellant Thomas F. Boyle and a declaration of appellant Jack Tippet. The declarations each set forth allegations that the respective appellant's parole had been revoked and sentence refixed without sufficient cause.

APPELLANTS' CONTENTION

The District Court erred by dismissing the action when appellants' complaint set forth violations of the Civil Rights Act.

SUMMARY OF APPELLEES' ARGUMENT

It is well settled by the decisions of this Court that the California Indeterminate Sentence law is valid under the United States Constitution. For this reason and also because a civil rights action may not be used as a substitute for habeas corpus, enforcement of the California Indeterminate Sentence law may not properly be enjoined under the provisions of the Civil Rights Act. The conduct alleged to have been perpetrated by the California Adult Authority and the individual members thereof falls within the area of immunity from civil liability; even construed most favorably in favor of stating a claim, appellants' allegations nevertheless only tend to show the Adult Authority acted within or

perhaps in excess of its jurisdiction but not in the absence of jurisdiction. No claim whatsoever is stated against Governor Ronald Reagan. The alleged conduct of the parole agents violated none of appellants' federally protected rights. It cannot reasonably be said that the complaint could be amended to state a claim upon which relief could be granted. Accordingly, the District Court did not err by dismissing the action.

ARGUMENT

THE COMPLAINT IN THE DISTRICT COURT DID NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Appellants' complaint is twofold in nature. Appellants on the one hand contend that the California Indeterminate Sentence law is unconstitutional on its face. On the other hand, appellants contend that the Indeterminate Sentence law has been applied to them so that their parole has been revoked and their terms refixed without sufficient cause.

It is essential to a claim either under section 1983 or section 1985 of Title 42, United States Code, that the defendants are alleged to have deprived plaintiffs of some federally-protected right. Cohen v. Norris, 300 F.2d 24, 30 (9th Cir. 1962); Hoffman v. Halden, 268 F.2d 280, 292 (9th Cir. 1959), overruled on other grounds in Cohen v. Norris, supra 300 F.2d at 29-30. The complaint

in the instant case failed to meet this requirement.

It is well settled that no federal question is raised by alleging that powers exercised by the Adult Authority have been illegally delegated by the California Legislature nor by the allegation that it is cruel and unusual punishment for the Adult Authority to refix the expiration date of a sentence because of rules infractions, nor by the allegation that some prisoners are longer in prison than others with similar convictions. Sturm v. California Adult Authority, No. 22072 (9th Cir. Dec. 21, 1967). Similarly, neither state law nor the federal Constitution requires the right to a hearing on revocation of parole at which the prisoner is entitled to counsel, to cross-examine witnesses, or to summon witnesses on his own behalf to support the prisoner's denial that he violated parole. Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967); In re McLain, 55 Cal.2d 78, 84-85, 357 P.2d 1080 (1960); In re Smith, 33 Cal.2d 797, 804, 205 P.2d 662 (1949).

It is also well settled that no federal question is raised by the allegation the Adult Authority may have based its decision on evidence which would not be admissible in a criminal proceeding; the strict evidentiary procedural limitations applicable to tribunals passing on guilt have no application to a parole revocation hearing. See, e.g., Williams v. New York, 337 U.S. 241, 246-49 (1949);

In re McLain, supra; In re Smith, supra.

Appellants' allegation that the California Adult Authority acted in excess of its jurisdiction when it revoked their paroles and refixed their terms is insufficient to state a claim under the Civil Rights Act. This is so because the members of the Adult Authority are immune from civil liability for discretionary acts done in their quasi-judicial capacity even though done in excess of jurisdiction but not with a clear absence of all jurisdiction. Bauers v. Heisel, 361 F.2d 581, 590-91 (3rd Cir. 1966), rehearing denied June 9, 1966. This is true even though the Adult Authority is alleged to have acted not only in excess of its jurisdiction but arbitrarily, capriciously, or maliciously. See, e.g., Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967); Lang v. Wood, 92 F.2d 211, 212 (D.C. Cir.), cert.denied 302 U.S. 686 (1937); Bauers v. Heisel, supra, 361 F.2d at 590.

To the extent that appellants' allegations may indicate the revocation of their paroles and the refixing of their sentences was invalid under the United States Constitution, the allegations should be presented by way of a petition for writ of habeas corpus. As is indicated above, the various governmental officials involved cannot properly be held civilly liable for an exercise of discretion done in their official capacity and not with a clear absence of authority. Because it is well settled that the

Indeterminate Sentence law is not unconstitutional on its face, its enforcement cannot in general be enjoined. See, e.g., Smith v. California, 336 F.2d 530 (9th Cir. 1964).

Moreover, it would be improper to specifically enjoin the enforcement of these laws which may have been improperly applied to revoke the parole and refix the terms of particular state prisoners. In the first place, a civil rights action such as the instant case cannot be treated as a petition for a writ of habeas corpus because the appellants' custodian is not a party to the action. Gaito v. Strauss, 368 F.2d 787, 788 (3rd Cir. 1966), cert.denied 386 U.S. 977 (1967). An action under the civil rights statutes may not be used as a substitute for habeas corpus. DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Gaito v. Strauss, supra. This is particularly true where to consider a civil rights action in such light would allow plaintiff to avoid the exhaustion of state remedies requirements of Title 28, United States Code section 2254. Johnson v. Walker, supra, 317 F.2d at 419-20; Davis v. Maryland, 248 F.Supp. 951, 952-53 (W.D. Md. 1965).

The above discussion is dispositive of the action insofar as it relates to the validity and the implementation of the California Indeterminate Sentence

law, the California Adult Authority, and its individual members. The second cause of action listed in the complaint purports to set forth a basis for civil liability of the two named parole agents. In this regard, appellants claimed Mr. Green and Frank Rao, in their capacity as parole agents, violated appellant's federally-protected rights by including only detrimental facts and circumstances in their parole reports and omitting beneficial facts and circumstances. This claim can readily be dismissed as patently frivolous. Appellants do not allege the facts set forth in the parole violation reports were false, and it is quite obvious that none of appellants' federally-protected rights were violated by this alleged conduct of the parole officers. This is because determination of what facts and circumstances are relevant and important to making a judgment regarding the revocation of parole and the refixing of a term is properly placed in the hands of the parole authorities. See, Williams v. Dunbar, supra, 377 F.2d at 506.

With regard to appellee Ronald Reagan, Governor of the State of California, not only did appellants' complaint fail to state a claim but its language is expressly self-limiting so that it could not reasonably be amended to state a claim (Complaint, p. 5, par. 11).

The remaining named parties are "The California

Legislature, as a body" and "The People of the State of California." No action under the Civil Rights Act lies against such defendants. Monroe v. Pape, 365 U.S. 167, 187-92 (1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the action be affirmed.

Dated: April 9, 1968

THOMAS C. LYNCH, Attorney
General of California

DERALD E. GRANBERG
Deputy Attorney General

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General

Attorneys for Appellees

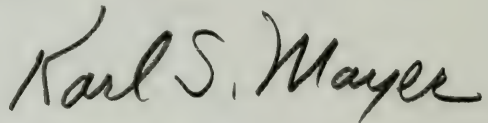
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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

April 9, 1968

A handwritten signature in cursive script that reads "Karl S. Mayer". The signature is written in dark ink and is positioned to the right of the typed name.

KARL S. MAYER
Deputy Attorney General of
the State of California

IN THE
United States
Court of Appeals

For the Ninth Circuit

AUTHER G. BARKLEY,
Appellant

v.

UNITED STATES OF AMERICA,
GEORGE D. PATTERSON,
District Director of Internal Revenue,
LESTER R. URETZ,
Chief Counsel of Internal Revenue Service,
and the COMMISSIONER
OF INTERNAL REVENUE,
Appellees

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BRIEF FOR THE APPELLEES

MITCHELL ROGOVIN,
Assistant Attorney General.
LEE A. JACKSON,
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Department of Justice,
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Of Counsel:

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United States Attorney.

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The District Court correctly dismissed the complaint for failure to set forth a claim upon which relief could be granted. Further, appellant has failed to show that the United Staes, which, as the Sovereign, can be sued by consent only, has given its consent to be sued. The District Director of Internal Revenue, as an official of the United States and acting in his official capacity, is immune from suit.....	3-7
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IN THE
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AUTHER G. BARKLEY,
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v.

UNITED STATES OF AMERICA,
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LESTER R. URETZ,
Chief Counsel of Internal Revenue Service,
and the COMMISSIONER
OF INTERNAL REVENUE,
Appellees

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEES

OPINION BELOW

There was no opinion filed by the District Court in this case.

JURISDICTION

The appeal is from a judgment of the United States District Court for the District of Arizona dismissing the appellant's complaint against the United States and certain of its employees for \$100,000,000. The

judgment of the District Court was entered on November 21, 1967. (I-R. 20.) Within sixty days thereafter, on November 27, 1967, a notice of appeal was filed. (I-R. 21.) An amended notice of appeal was filed on November 28, 1967. (I-R. 22.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly granted the appellees' motion to dismiss the complaint filed against the United States of America, the District Director of the Internal Revenue Service, the Chief Counsel of the Internal Revenue Service, and the Commissioner of Internal Revenue, which asked for \$100,000,000 in damages.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the statutes and Regulations involved will be found in the Appendix, *infra*.

STATEMENT

The appellant's complaint arises from the seizure on September 8, 1967, of his wife's pay check from the McGraw Edison Company as payment of the appellant's and his wife's income tax for the taxable year ending December 31, 1966. (I-R. 3, 11.) A notice of levy, which set forth that the appellant and his wife owed the Government \$323.85 in income taxes for 1966 and had refused to pay it, was sent to the McGraw Edison Company by the District Director of the Internal Revenue Service on August 29, 1967. (I-R. 10.) The appellant, who now has an appeal pending in this Court (No. 22061) for a redetermination of his wife's and his income taxes for the taxable year ending on December 31, 1964, apparently thinks that the money

was seized as taxes for the taxable year 1964. (I-R. 3, 6-9.)

Because of this seizure, the appellant is suing the United States of America, George D. Patterson (District Director of the Internal Revenue Service), Lester Uretz (Chief Counsel of the Internal Revenue Service), and the Commissioner of Internal Revenue (I-R. 1) and requests damages in the amount of \$100,000,000 (I-R. 4).

On November 21, 1967, the District Court granted the defendants-appellees' motion to dismiss the complaint. (I-R. 15, 20.) From this decision, the appellant appeals.

SUMMARY OF ARGUMENT

The District Director correctly dismissed the complaint for failure to set forth a claim upon which relief could be granted. Further, its decision is correct as to the United States because the District Court has power to entertain a suit against the United States only when it has given its consent to be sued and the appellant has failed to show where it has given such consent. As to the District Director for the Internal Revenue Service the lower court's decision is correct, because, as an official of the United States, he is immune from suit when acting in his official capacity.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT FOR FAILURE TO SET FORTH A CLAIM UPON WHICH RELIEF COULD BE GRANTED. FURTHER, APPELLANT HAS FAILED TO SHOW THAT THE UNITED STATES, WHICH, AS THE SOVEREIGN, CAN BE SUED BY CONSENT ONLY, HAS GIVEN ITS CONSENT TO BE SUED.

THE DISTRICT DIRECTOR OF INTERNAL REVENUE, AS AN OFFICIAL OF THE UNITED STATES AND ACTING IN HIS OFFICIAL CAPACITY, IS IMMUNE FROM SUIT

Although the District Court did not set forth its reasons for dismissing the complaint without prejudice (I-R. 20), it is clear that it did so because the appellant's complaint failed to set forth a claim upon which relief could be granted. (II-R. 13).

Rule 8(a)(2) of the Federal Rules of Civil Procedure lays down that a complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." This Court has stated the requirements of Rule 8(a)(2) in the following terms (*Patten v. Dennis*, 134 F. 2d 137, 138 (1943)):

The requirements of a complaint may be stated, in different words, as being a statement of facts showing * * * (2) ownership of a right by plaintiff; (3) violation of that right by defendant; (4) injury resulting to plaintiff by such violation; * * *.

The Supreme Court has stated that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

The appellant's complaint appears to center around the fact that the District Director of the Internal Revenue Service on September 8, 1967, levied upon a pay check due his wife from McGraw Edison Company. (I-R. 3, 10-11.) Although not a part of the record herein, the records of the Internal Revenue Service show that this collection was made in connection with the 1966 Federal income tax return, which the appellant and his wife filed jointly—thus making each jointly and separately liable for the entire amount of tax there shown by them to be due (Section 6013(d)(3) of the 1954

Internal Revenue Code, Appendix, *infra*). Further the Service's records show that this collection was in all respects in conformity with the procedures prescribed in the law. Indeed, the appellant makes no allegation that the collection procedures were not in fact followed. Rather, his complaint seems to be based upon the mistaken belief that the collection in question had some connection with the matters then and now pending before this Court in *Barkley v. Commissioner*, No. 22061, in which the appellant is litigating his individual tax liability for the year 1964¹. At the hearing below at which the appellant's complaint was dismissed, the District Court perceived this misunderstanding on the part of the appellant and attempted to explain it to him. (II-R. 10, 11, 13.)

The Internal Revenue Code of 1954. Section 7422, Appendix, *infra*, provides the sole method by which a taxpayer may, after a tax for a given tax year has been paid or collected, contest the legality of the collection and seek its refund. As a prerequisite to such a suit, the taxpayer must file a claim for refund with the appropriate District Director, stating the basis upon which refund is thought to be proper. If a refund is sought, this statutorily prescribed avenue remains open and must be pursued as the sole remedy allowed

1 Appellant fails to realize that each taxable year is a separate taxable period. Thus disputes as to one taxable year do not bar the enforcement of taxes for other taxable years. Section 1 of the Internal Revenue Code, Appendix, *infra*, lays down that a tax will be imposed upon income at a given rate for each year. Sections 6201, 6301, and 6331 of the Internal Revenue Code of 1954, Appendix, *infra*, give the Secretary of the Treasury or his delegate the power to make an assessment for taxes and to seize the property of the taxpayer when he refuses to pay his taxes. The power conferred by Section 6331 of that Code to seize the taxpayer's property upon his refusal to pay the tax was held not to violate the due process clause of the Fifth Amendment. *Springer v. United States*, 102 U.S. 586, 593-594 (1880). Sections 301.6201-1, 301.6301-1, and 301.6331-1 of the Treasury Regulations on procedure and administration (1954 Code) lay down that the District Director of Internal Revenue is the Secretary of the Treasury's delegate to make the assessment and to issue the notice of levy.

to the taxpayer by law. The appellant has not followed the prescribed avenue herein.

The appellant has no standing in any event to complain of the collection from his wife. Since the levy was solely upon funds belonging to her, the appellant has failed to allege or show any injury to himself from the event in question. Hence, if there were any available cause of action growing out of the collection by levy, the appellant's wife would be the only party having the right to pursue it.

In order to state a claim against the United States, the appellant must show that one of its agents, acting within the scope of his duties or under the color of his office, violated a right of the appellant, which caused damage to him. *Whiteside v. United States*, 93 U.S. 247, 257 (1876). The appellant has failed to allege any injury to himself or to show wherein any specific act of any of the named appellees² was in violation of a constitutional right³ or in contravention of prescribed statutory procedures. Therefore, the complaint fails to show a claim upon which relief can be granted.

Additionally, we point out that the court has no jurisdiction over the United States unless the party who institutes the suit against it shows that it has given its

2 The District Director is in any event immune from suit for acts performed in the scope of his official duties. *Bershad v. Wood*, 290 F. 2d 714 (C.A. 9th, 1961). See also, *S & S Logging Co. v. Barker*, 366 F. 2d 617 (C.A. 9th, 1966); and *O'Campo v. Hardisty*, 262 F. 2d 621 (C.A. 9th, 1958). Inasmuch as the District Director is required by law to make assessments for federal income taxes and to levy on the taxpayer's property when the taxes due are not paid, he was acting within the scope of his official duties when he seized the appellant's wife's pay check.

3 The Sixteenth Amendment of the Constitution gives to the Congress the power to impose taxes upon incomes. The ability of the Government to collect taxes with deliberate speed is essential to its existence. *Providence Bank v. Billings*, 4 Pet. 514, 560 (1830). Its ability to collect taxes is not in conflict with the provision of the Fifth Amendment of the Constitution, which says that the Government must pay just compensation when it seizes property. *Brushaber v. Union Pac. R.R.* 240 U.S. 1, 24 (1916).

consent to be sued. In *United States v. Clarke*, 8 Pet. 436, 443-444 (1834), Chief Justice Marshall said:

As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it.

See also *United States v. Lee*, 106 U.S. 196 (1882); and *Jules Hairstylists of Maryland v. United States*, 268 F. Supp. 511, 514 (Md., 1967), affirmed *per curiam* F. 2d (C.A. 4th, 1968). When the appellant fails to show that the United States has given its consent to be sued, dismissal of the action is required as to the United States. *Stout v. United States*, 229 F. 2d 918 (C.A. 2d, 1956), certiorari denied, 351 U.S. 982 (1956). As we have shown, the only authorization for a suit against the United States in connection with the collection of taxes, is a suit for refund under Section 7422, following rejection by the District Director of an appropriate and timely claim for refund. This does not purport to be such an action: no other authority is cited.

CONCLUSION

For the reasons given above, the dismissal of the appellant's complaint should be affirmed.

Respectfully submitted,
MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
WILLIAM A. FRIEDLANDER,
DAVID ENGLISH CARMACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

April, 1968.

Of Counsel:

EDWARD E. DAVIS,
United States Attorney.

RICHARD C. GORMLEY,
Assistant United States Attorney.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: 19th day of April, 1968.

RICHARD C. GORMLEY
Assistant United States Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 1. TAX IMPOSED.

- (a) [as amended by Sec. 111(a), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19] *Rates of Tax on Individuals.* —

* * * *

(2) *Taxable years beginning after December 31, 1964.*—In the case of a taxable year beginning after December 31, 1964, there is hereby imposed on the taxable income of every individual (other than a head of a household to whom subsection (b) applies) a tax determined in accordance with the following table:

* * * *

(26 U.S.C. 1964 ed., Sec. 1.)

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

* * * *

- (d) *Definitions.* — For purposes of this section —

* * * *

(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

(26 U.S.C. 1964 ed., Sec. 6013.)

SEC. 6201. ASSESSMENT AUTHORITY.

(a) *Authority of Secretary or Delegate.* — The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) *Taxes shown on return.*—The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title.

* * * *

(26 U.S.C. 1964 ed., Sec. 6201.)

SEC. 6301. COLLECTION AUTHORITY.

The Secretary or his delegate shall collect the taxes imposed by the internal revenue laws.

(26 U.S.C. 1964 ed., Sec. 6301.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.* — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

* * * *

(26 U.S.C. 1964 ed., Sec. 6331.)

SEC. 7442. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.* — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

(b) *Protest or Duress.*—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

* * * *

(26 U.S.C. 1964 ed., Sec. 7442.)

Treasury Regulations on Procedure and Administration (1954 Code)

§301.6201-1 *Assessment authority.*

(a) *In general.* The district director is authorized and required to make all inquiries necessary to the determination and assessment of all taxes imposed by the Internal Revenue Code of 1954 or any prior internal revenue law. The district director is further authorized and required, and the director of the regional service center is authorized, to make the determinations and the assessments of such taxes. However, certain inquiries and determinations are, by direction of the Commissioner, made by other officials such as assistant regional commissioners. The term "taxes" includes interest, additional amounts, additions to the taxes, and assessable penalties. The authority of the district director and the director of the regional service center to make assessments includes the following:

(1) *Taxes shown on return.* The district director or the director of the regional service center shall assess all taxes determined by the taxpayer or by the district director or the director of the regional service center and disclosed on a return or list.

* * * *

(26 C.F.R., Sec. 301.6201-1.)

§301.6301-1 *Collection authority.*

The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue. * * *

(26 C.F.R., Sec. 301.6301-1.)

§301.6331-1 *Levy and distraint.*

(a) *Authority to levy* — (1) *In general.* If any person liable to pay any tax neglects or refuses to pay such tax within 10 days after notice and demand, the district director to whom the assessment is charged or, upon his request, any other district director may proceed to collect the tax by levy upon any property, or rights to property, whether real or personal, tangible or intangible, belonging to such person or on which there is a lien provided by section 6321 or 6324 (or the corresponding provision of prior law) for the payment of such tax. As used in section 6331 and this section, the term "tax" includes any interest, additional amount, addition to tax, or assessable penalty, together with any costs and expenses that may accrue in addition thereto. For exemption of certain property from levy, see section 6334 and the regulations thereunder. Property subject to a Federal tax lien, which has been sold or otherwise transferred by the taxpayer, may be seized in the hands of the transferee or of any subsequent transferee. Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy, such as, for example: receivables, bank accounts, evidences of debt, securities, and accrued salaries, wages, commissions, and other compensation.

* * * *

(26 C.F.R., Sec. 301.6331-1.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER G. BARKLEY
BRIEF

DOCKET NO. 22540

V.
GEORGE D. PATTERSON, DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE, LESTER A.
WIFE, CHIEF COUNSEL OF INTERNAL REVENUE
SERVICE, COMMISSIONER OF INTERNAL REVENUE
SERVICE, UNITED STATES OF AMERICA.
RESPONDENTS.

MARCH 18, 1968

OFFICE OF THE CLERK

Mr. Luck, Esquire

I Certify that, in connection with the preparation of this
Brief, I have examined Rules 18, 19 and 39 of the United States Court
of Appeals for the Ninth Circuit, and that, in my opinion, the fore-
going Brief is in full compliance with those Rules.

PETITIONER, Certify, that Petitioner mailed three (3) copies
of the deficient letters of the above case, to the above Respondents,
March 18, 1968.

Yours Very Truly

Walter G. Barkley
Walter G. Barkley
4145 N. Pittsford St.
Phoenix, Arizona

STATE OF ARIZONA
COUNTY OF MARICOPA

This instrument was acknowledged before me this 18 day of
March, 1968, by Walter G. Barkley
in witness whereof I here-with set my hand and seal of said seal.

Clella R. Berg
_____, NOTARY PUBLIC

My Commission Expires Oct. 15, 1971

FILED

MAR 15 1968

W. M. LUCK, CLERK

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For example, a person who is a member of the American Bar Association, and who is also a member of the American Medical Association, would be subject to the rules of both organizations. The rules of the American Bar Association would apply to the person's conduct as a lawyer, and the rules of the American Medical Association would apply to the person's conduct as a doctor. The person would be subject to the rules of both organizations, and would be required to follow the rules of both organizations.

1. The first of these is the fact that the system is not a simple one. It is a complex system, and the results of the analysis are not always clear. The system is a complex one, and the results of the analysis are not always clear.

THE OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON, D. C.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OTHER G. BARKLEY
BRIEFS.

DOCKET NO. 22540

V.

GEORGE D. PATTERSON, DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE. LESTER E.
METZ, CHIEF COUNSEL OF INTERNAL REVENUE
SERVICE. COMMISSIONER OF INTERNAL REVENUE
SERVICE. UNITED STATES OF AMERICA.

MARCH 18, 1968

RESPONDENTS.

IN RECAPTS TO YOUR RUL'S 18, 19 and 39.

TEST: UNITED STATES COURT OF CLAIMS. STATUTES RULES, STILL.
VII SPECIAL JURISDICTION ACTS.

ARTICLE 202. PAGE 587.

A STATUTES giving the Court authority to "hear and determine"
claim to "judgment", with rights of appeal, and the absence of res-
trictive clause, held to subject the Government to liability, through
the claim be founded on the negligence of public agents, Walton, 24-372.

PLAINTIFF, request the relief of injury from the United States
America, for the violation of the Purpose (or Spirit) of Amendments,
the Constitution of the United States of America, ON August 29,
1967 through September 1967.

IN THE TRANSCRIPT OF RECORD, from page 5, through 14, it shows
that the Internal Revenue Service acted with out a Due process of law
and violated the "Cherished", Bill of Rights, against the Plaintiff.

IN THE TRANSCRIPT OF RECORD, page 15, their Motion to Dismiss.
find in the Digest of U.S. Court of Claims. Statutes Rules, Still.
page 198, Sec. 1. The Constitutional duty of the Government to make
compensation for private property taken for public use raises an implied
promise to do so, and for such property the owner should receive its
fair value. GRANT, 1-41. SECTION 10b, page 149, same Statutes, states,
the Government is not bound by the act or declaration of its agents,
unless it manifestly appears that he acted within the scope of his auth-
ority, or was employed in his capacity as a public agent to do the act or
make the declaration for it. WHITEHEAD et al 93 U.S. 247 aff. 8-532.

5392 J. Neurosci., July 26, 2006 • 26(30):5387–5395

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY. IT IS NOT TO BE USED FOR ANY OTHER PURPOSE. IT IS THE PROPERTY OF THE UNITED STATES GOVERNMENT AND IS LOANED TO YOU. IT AND ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY. IT IS TO BE RETURNED TO THE SOURCE OF ORIGIN. IT IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM. IT IS TO BE DESTROYED WHEN NO LONGER REQUIRED FOR OFFICIAL USE. IT IS NOT TO BE USED FOR ANY OTHER PURPOSE. IT IS THE PROPERTY OF THE UNITED STATES GOVERNMENT AND IS LOANED TO YOU. IT AND ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY. IT IS TO BE RETURNED TO THE SOURCE OF ORIGIN. IT IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM. IT IS TO BE DESTROYED WHEN NO LONGER REQUIRED FOR OFFICIAL USE.

(continued from page 6)

100-443887-1000

The end of the world

... a statement giving the facts pertinent to "Camp and Detachment" and to "Judgment", with views of appeal, and the absence of any other statement, and to request the Government to furnish the same.

The Commission of the United States of America,
for the violation of the various laws relating to
immigration, requests the relief of injury from the United States

• *Wetzel, 1985*

IN THE DISTRICT OF COLUMBIA, Town Page 2, through 14, it says
the Federal Bureau of Investigation dated with a list of names of the
persons who were arrested, and the names of the persons who were
arrested, and the names of the persons who were arrested.

IN THE MATTER OF THE ESTATE OF JAMES EARL RAY, DECEASED

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SAME STATUTES, page 235. Sec. 223. WHERE property to which the United States asserts no title is taken by their agents, pursuant to act of Congress, as private property for the public use, the Government is under an implied obligation to make compensation therefore, owner's claim is one arising out of implied contract. Plaintiff states here, that the Cherished Bill of Rights and his Tax Dollar is free Peoples own private property, SAME STATUTES. page 235. Sec. . though the Government is not responsible for trespass of its officers who illegally seize property of a citizen, yet if the proceeds go into the Treasury the Government is liable on implied contract. This Court has jurisdiction. Plaintiff states here, that the Cherished Bill of Rights, and his Tax Dollar is the free People own private contract guaranteed by the United States Government since 1791. and if any Person, company, Department, or Organization infringe upon that Person private property, or his private contract, THE UNITED STATES SUPREME COURT maintains for that purpose. and Congress can not make any laws denying free People of those TWO rights.

PLAINTIFF, request the relief of injury suffered in this violation, fair share of this Country growth-wealth from the beginning of the Cherished, Bill of Rights, 1791 through 1967, or an estimated damage of Hundred Million Dollars.

Author G. Barkley
Author G. Barkley
4145 North Mitchell Street
Phoenix, Arizona

STATE OF ARIZONA
COUNTY OF MARICOPA
This instrument was filed on the 18 day of
March, 1968, by Author G. Barkley
In witness whereof I have hereunto set my hand and
Chella Riley

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UTHER G. BARKLEY
PETITIONER
REPLY BRIEFS.

V.

GEORGE D. PATTERSON, DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE. LESTER R.
RETZ, CHIEF COUNSEL OF INTERNAL REVENUE
SERVICE. COMMISSIONER OF INTERNAL REVENUE
SERVICE. UNITED STATES OF AMERICA.
RESPONDENTS

) DOCKET NO. 22540

) APRIL 23, 1968

PETITIONER, Object to the Respondents Brief of April 19, 1968
of the above name case. It is misleading, and a Conspiracy to avoid
justice. When started, there was one Counsel for the Respondents,
now there six (6).

IN the Appellees Brief, on pages 4, 5, and 6. Appellees speak
of the tax dollar as of only a year by year system of our Government.
Appellant stands, that his tax dollar is a living body of his "Cher-
ished Bill of Rights" from the begining to the end. and in 1964, when
Appellant filed with the Internal Revenue Service, Appellant declared
Plea to the Internal Revenue Service, Requesting that Appellant tax
dollar to stahd for Appellant Constitutional Rights which have been
denied to Appellant by the State and Federal Government. and on pages
10 and 11 of Appellant transcript of record shows that the Internal
Revenue Service seized that portion of the body of the case which is
pending in court. The Internal Revenue Service acted with out a Due
process of law which violated the PURPOSE (OR SPIRIT) of Amendmen ts
of the Constitution of the United States of America.

ON page six (6) of Appellees Brief, Appellees states that the
Appellant wife should be the one to file suit. On page nine (9) of
Appellant transcript of record shows that on September 29, 1966 the
Tax Court granted the Appellant as the sole responsible person and
not of his wife.

ON pages 6 and 7 of Appellees Brief, Appellees states that the
United States has to give consent to be sued. on pages one and two

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the Commission of the United States of America.

ON page 115 (5) of Appendix A, the following should be added:

THE UNIVERSITY OF CHICAGO PRESS

of the Appellant transcript of record which states the Amendments of the Constitution and the Great Men on the Constitution which speaks different to Appellees opinion. Charles A. Dana, Great Man on the Constitution. states, In order to understand the theory of the American Government, the most serious, calm, persistent study should be given to the Constitution of the United States. I don't learn it by heart, committing it to memory. What you want is to understand it, to know the principles at the bottom of it.

Congress can make no laws to deny the free people of these United States of America their rights to request their Tax Dollar to stand for their Constitutional Rights, and for their Constitutional Rights to stand for their Tax Dollar. and when any Person, Company, Organization or Department violates these Rights, the Appellant reserves the right to meet them face to face in Court and receive redress of injury by him so sustained.

United States Supreme Court. The highest Court in the United States, established by the Constitution and organized by Congress under the Judiciary Act of September 24, 1787. As the highest tribunal, the Supreme Court receives the final pleas of debatable or unsatisfactory judgements of lower courts: has power to judge all cases arising under the laws of the United States, that seems to conflict with the Constitution.

IN SUPPORT THEREOF: Appellant respectfully show unto the Court. The above-entitled case is now at issue.

PETITIONER request that the above name RESPONDENTS, come to Court and fight, or give up.

CERTIFICATE: I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the forgoing brief is in full compliance with those rules.

Author G. Barkley
Author G. Barkley
4145 N. Mitchell St.
Phoenix, Arizona 85014

OF ARIZONA } ss.
COUNTY OF MARICOPA
I, Notary Public, do hereby certify that the foregoing document was acknowledged before me this 23 day of August, 1968, by Author G. Barkley, who is personally known to me and official seal.

NOTARY PUBLIC

the applicant requested an interview with the Committee. The Committee and the Board met on the 12th of March, 1941, and the applicant was present. The Committee and the Board discussed the applicant's case and the Committee recommended that the applicant be granted a license to practice as a chemist. The Board agreed with the Committee's recommendation and granted the applicant a license to practice as a chemist. The applicant was interviewed by the Committee on the 12th of March, 1941, and the Committee recommended that the applicant be granted a license to practice as a chemist. The Board agreed with the Committee's recommendation and granted the applicant a license to practice as a chemist.

[illegible]

1. The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

